Supreme Court, U.S.
FILED
04-911 DEC 2 - 2004
OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

KEYSTONE LAND & DEVELOPMENT COMPANY,
Petitioner,

v.

XEROX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Erie v. Tompkins requires a federal court in diversity cases to apply applicable state substantive law. The certification process has evolved as an efficient procedure for allowing a federal court to request the highest court of a state to determine unresolved questions of local law. In this summary judgment proceeding the Ninth Circuit certified to the Washington State Supreme Court the question of whether, consistent with the modern trend of contract law, Washington law would recognize an agreement to negotiate a future contract "under the circumstances presented in this case."

In addition to providing guidance as to Washington law, the Ninth Circuit empowered the Washington State Supreme Court to actually decide this case by applying the law, as determined by it, to the specific facts of this case. In response, the Washington State Supreme Court concluded that a contract to negotiate had not been formed between the parties. The Ninth Circuit thereafter adopted the Washington State Supreme Court's decision as representing a definitive and dispositive expression of Washington law.

Thus, the following question is presented for this Court's consideration:

Whether a federal court which has certified to a state court an unresolved question of local law may also delegate to the state court responsibility for the application of the law to the facts of the case, as determined by the state court to be relevant, thereby allowing the state court's decision to be dispositive of the case over which the federal court has exclusive jurisdiction.

PARTIES TO THE PROCEEDING

Petitioner is Keystone Land & Development Company ("Keystone"), a Washington corporation which has no parent corporation. No publicly held company owns 10% or more of Keystone's stock. Keystone was the plaintiff/counter-defendant in the proceedings below.

Respondent is Xerox Corporation ("Xerox"), a New York corporation. Xerox was the defendant/counter-claimant in the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Keystone respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit (the "Court of Appeals") affirming the entry of summary judgment by the United States District Court for the Western District of Washington (the "District Court") in favor of Xerox. Based on the clearly erroneous and unprecedented application of the certification process adopted by the Court of Appeals, Keystone further requests the Court to consider ordering the summary reversal of the Court of Appeals' decision.

OPINIONS BELOW

The Court of Appeals' Certification Order (App. E at 24a-34a) is reported at 353 F.3d 1093. The Court of Appeals' Clarification Order, which was not published, is attached as App. D at 20a-23a. The opinion of the Washington State Supreme Court (App. C at 9a-19a) is reported at 152 Wn.2d 171, 94 P.3d 945. The Court of Appeals' opinion (App. B at 2a-8a) is reported at 378 F.3d 949. The Court of Appeals' unpublished order denying Keystone's Petition for Rehearing is attached as App. A at 1a.

JURISDICTIONAL STATEMENT

The Court of Appeals' decision was entered on August 4, 2004. Keystone timely filed a Petition for Panel Rehearing. The Court of Appeals denied Keystone's petition on September 7, 2004. App. A at 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Article III. Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .

Article III. Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States . . . .

United States Code:

§1332. Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between -

(1) citizens of different States;

. . .

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .

Revised Code of Washington:

RCW 2.60.020. Federal court certification of local law question.

When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

STATEMENT OF THE CASE

Keystone commenced litigation against Xerox for breach of contract based on Xerox's refusal to sell its office building to Keystone. Alternatively, Keystone claimed that Xerox at a minimum breached a separate and distinct contract obligating Xerox to negotiate the terms of a formal Purchase and Sale Agreement for the building's sale. The District Court, having jurisdiction under 28 U.S.C. §1332 based on diversity of citizenship, granted Xerox's motion for summary judgment as to both contracts alleged by Keystone. Keystone timely filed an appeal with the Court of Appeals.

The Court of Appeals affirmed the District Court's summary judgment as to the existence of a contract to sell the building. However, after specifically recognizing that "the modern trend in contract law" as well as "[m]any modern commentators" support the enforceability of a contract to

negotiate such as asserted by Keystone, the Court of Appeals concluded that Washington "contract law is not entirely settled" on this important issue. Consequently, the Court of Appeals certified the following question to the Washington State Supreme Court (the "Supreme Court") pursuant to Washington's Federal Court Local Law Certificate Procedure Act, RCW 2.60.010 *et seq.*: "Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract ***under the circumstances presented in this case***?"[1] Certification Order, App. E at 33a (emphasis added).

During oral argument before the Supreme Court Chief Justice Alexander expressed his misgivings about being requested to answer the certified question "under the circumstances of this case." He was specifically "bothered" by the fact that the Supreme Court was "supposed to look at the Ninth Circuit record and say, 'you're out of court or you're in court.'" Chief Justice Alexander believed that the Supreme Court was being requested to "decide the Ninth Circuit's case for them." Excerpts From Oral Arguments in the Supreme Court, App. F at 37a. Chief Justice Alexander even questioned "[i]sn't that the federal judges' job to decide . . . how to apply the law under the circumstances of this case? Why was that in there?" *Id.*

Motivated primarily by the obvious confusion expressed by the Supreme Court, prior to the Supreme Court's issuance of its decision Keystone filed with the Court of Appeals a Motion for Clarification of the Certification Order.

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[1] The Court of Appeals also certified a second question as to "the proper measure of damages for the breach of a contract to negotiate." The Supreme Court declined to consider this question.

Specifically acknowledging that "there were some expressions of concern by members of the [supreme] court to deciding the ultimate issue in this specific case, as opposed to providing a general statement of Washington contract law," the Court of Appeals nevertheless emphasized that it "did ask for an opinion [from the Supreme Court] as applied to this case . . . [in order] to make the certified question dispositive of the case." Clarification Order, App. D at 21a-22a. The Court of Appeals explained that it intentionally framed the certified question "with the view that would make it more likely that the Washington State Supreme Court would be willing to accept certification, spend its valuable time, and express its view on the applicable Washington law of contract." *Id.*

As actively encouraged by the Court of Appeals, the Supreme Court proceeded to decide *Keystone v. Xerox* on its merits. Declining to definitively resolve whether Washington contract law will ever recognize the enforceability of an agreement to negotiate, the Supreme Court nevertheless "answer[ed] the first question, under the circumstances presented in this case, no." Supreme Court Opinion, App. C at 10a-11a. The Supreme Court, based exclusively on its review of certain correspondence exchanged between Keystone and Xerox, concluded that a contract to negotiate had not been formed. The Supreme Court found that "[t]he parties did not exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time . . . . There was never an agreement as to how the parties were required to proceed." Supreme Court Opinion, App. C at 17a-18a.

The Court of Appeals without question or comment adopted the Supreme Court's resolution of the case. The Court of Appeals concluded that "in accord with the law as

determined by the Washington State Supreme Court," Keystone's challenge to the District Court's grant of summary judgment was "resolve[d]." Court of Appeals Opinion, App. B at 6a. Accordingly, the Court of Appeals "affirm[ed] the district court's grant of summary judgment to Xerox based on the answer provided by the Washington State Supreme Court." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S CERTIFICATION ORDER, AS CLARIFIED, SANCTIONS SUCH AN EXTREME DEPARTURE FROM ACCEPTED AND USUSAL JUDICIAL PROCEEDINGS AS TO REQUIRE THIS COURT'S EXERCISE OF ITS SUPERVISORY POWERS.

A. Overview of the Certification Process.

Article III, Sections 1 and 2 of the Constitution of the United States vest in the federal court system judicial power as to all cases "arising under . . . the Laws of the United States." Statutorily, 28 U.S.C. §1332 specifically designates federal courts as having jurisdiction over cases in which either of the parties, assuming the existence of diversity of citizenship between them, elects to commence the action in or remove it to federal court. Once federal jurisdiction has been invoked, the federal judiciary has exclusive power and responsibility for the ultimate resolution of the controversy.

Since the announcement of the "Erie doctrine"[2] federal courts sitting in diversity cases are required to apply state law

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[2] *Erie R. Co, v. Tompkins*, 304 U.S. 64 (1938).

to resolve substantive law issues. In cases where an important question of state law has not been definitively established, the federal court can elect to request the highest court of the state to answer the question of local law, thereby eliminating the need for the federal court to speculate as to its composition. Most states, including Washington, have adopted statutes specifically authorizing a federal court to certify for determination an undecided "question of local law," with the state's highest court "render[ing] its opinion in answer thereto." RCW 2.60.020.

Upon providing guidance as to local law, the state court has completed its limited role in the certification process. Based on the federal judge's or jury's determination of relevant facts, the federal court must then apply the local law as defined by the state court in discharge of its constitutional and statutory obligations relative to the case pending before it.

B. The Certification Process Adopted by the Court of Appeals in this Case Resulted in an Abdication of the Court of Appeals' Jurisdictional Responsibilities.

The exclusive function of certification is to assist a federal court, in accordance with the principles established in *Erie v. Tompkins*, in determining applicable state law. Indeed, Washington's Federal Court Local Law Certificate Procedure Act specifically authorizes a federal court when "it is necessary to ascertain the local law of this state . . . [to] certify to the supreme court for answer the question of local law involved." RCW 2.60.020. Based on the confusion associated with reconciling "older Washington precedents" with "the modern trend in contract law," it was appropriate for the Court of Appeals in this case to request the Supreme Court's guidance as to whether Washington law would

recognize "an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract." Once the Supreme Court provided its "answer [to] the question of local law," however, its involvement in these proceedings should properly have concluded.

The Supreme Court specifically concluded that it was "unnecessary to decide whether Washington will ever enforce a contract to negotiate," even though this represented precisely the undecided question of local law raised in this case. Supreme Court Opinion, App. C at 17a. Nevertheless, although not directly responsive to the certified question, the Supreme Court proceeded to announce the following essential requirements in Washington for an agreement to negotiate to be valid: an "exchange [of] promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time." *Id.*

In a dramatic expansion of the targeted focus of certification on the unresolved issue of local law, the Supreme Court, based on its somewhat limited exposure to the facts of this case, nevertheless decided that "[t]he exchange of letters with which we are presented does not constitute a contract to negotiate." *Id.* Thus, the Supreme Court, in addition to clarifying the essential elements for a valid contract to negotiate, both ***determined the facts*** of this case and ***applied the law*** to these facts concluding that a contract to negotiate was not formed "under the circumstances presented in this case." Based on the answer provided by the Supreme Court, the Court of Appeals simply held that "[u]nder Washington law, as explained by the Washington State Supreme Court, Keystone's evidence does not suffice to establish a contract to negotiate." Court of Appeals Opinion, App. B at 7a.

Whether or not Keystone and Xerox, based on the specialized circumstances surrounding their negotiations, objectively manifested a mutual intent to enter into an agreement to negotiate requires an intensively fact-based, case-specific inquiry. Rather than answering any novel question of local law, the Supreme Court provided its opinion as to how it would decide a fairly routine contract formation case ***as if the case was pending in state court for disposition***. As a result, the Supreme Court actually decided the "ultimate issue in this specific case." As suggested by the Court of Appeals, this made the answer to "the certified question dispositive of the case." Clarification Order, App. D at 21a-22a.

Consequently, the Court of Appeals – the court with "original jurisdiction" over this diversity case based on Article III, Section 2 of the Constitution and U.S.C. §1332(a)(1) – was not the court which actually decided *Keystone v. Xerox*. The Court of Appeals essentially delegated its fact-finding and decision-making responsibilities to the Supreme Court. It then rubber-stamped the state court's decision as constituting a definitive "explanation" of local law. Such a clear abdication of federal judicial responsibility, whether in a certification case or otherwise, is both unprecedented and disturbing as to its significance.[3]

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[3] Keystone's extensive legal research has failed to uncover even a single case, federal or state, in which the certification process was utilized for any purpose other than settling an undecided question of state law. Keystone specifically failed to locate ***any*** case in which certification was used for the purpose of requesting the state court to either determine the facts or apply the law as established through certification to the particular facts of the case. In no case was the state court requested or allowed to provide an answer which was intended to be dispositive of the litigation

C. The Consequences of the Certification Process Adopted by the Court of Appeals are Potentially Devastating to the Operation of the Judicial System.

The complexities of resolving civil disputes are multiplied significantly with the inter-jurisdictional sharing of responsibilities associated with the certification process. Based on the necessity of balancing the interests of state and federal judicial systems, a well-established practice has evolved which carefully and predictably confines the state court's function in certification cases to providing guidance as to the content of local law. At least prior to the Court of Appeals' decision in this case, the federal court has been exclusively responsible for both fact-finding and applying the law, as determined by the state court in response to a certification order, to the facts of the case. The certification process used by the Court of Appeals in this case realigns the carefully developed balance of power between the state and federal judicial systems by ceding to the state court ultimate responsibility for fact-finding and case resolution.

The Court of Appeals' decision in this case, which currently represents the law throughout the influential Ninth Circuit and significant precedent for subsequent cases, approves and encourages a dramatic and disturbing expansion

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pending in federal court.

Confirming Keystone's research, Wright, Miller & Cooper have commented that: "The [abstention] procedure is not needed where certification is used, and an attempt to have the state court make final resolution of a case properly commenced in federal court would raise questions about the state court's jurisdiction over the parties and the finality of its judgment." 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §4248 at 175 (2d ed. 1988).

of the certification process. Based on the authority of *Keystone v. Xerox*, a federal district court or court of appeals is now justified in delegating its jurisdictional control over a case to a state court to engage in fact-finding and even the ultimate disposition of the case on its merits. The federal court in which the case is actually pending, according to the Court of Appeals, can then simply adopt the state court's decision as an authoritative "explanation" of applicable state law. In addition to constituting an abdication of judicial responsibility, the certification model sanctioned by the Court of Appeals provides the federal court in complicated or controversial cases with the opportunity to practice "decision ducking" or "case avoidance" by simply referring the case to the state court for resolution. Although the state court is free to either refuse to answer or reframe the certified question a state court will rarely decline to answer a specific question asked by a federal court.

In addition to creating serious jurisdictional problems, the certification process employed by the Court of Appeals in this case results in the creation of nothing less than judicial chaos. As clearly demonstrated by the state and federal decisions produced in this particular case: confusion was created as to the respective roles and responsibilities of the involved federal and state court systems; mistakes were made as to the proper standards of judicial review; disputed factual issues were misunderstood or overlooked; federal and state court published opinions are in clear conflict as to the existence and significance of factual disputes; the certification statute's limited scope was exceeded; the litigants were denied the opportunity to argue the application of the law, as recently announced by the state court, to the specific facts of the case; and, most significantly, a state court actually decided a relatively straightforward contract formation case over which a federal court has exclusive jurisdiction. In short, the

creation of bad law is an inevitable consequence of such a process.

1. The Supreme Court Was Confused By the Certification Process Adopted by the Court of Appeals.

The Supreme Court, presumably busy with a docket full of cases properly before it, was justifiably confused as to what to do with *Keystone v. Xerox*. Chief Justice Alexander somewhat incredulously questioned why the Supreme Court was being "bothered" with "decid[ing] the Ninth Circuit's case for them," when after all it was "the federal judges' job to decide . . . how to apply the law under the circumstances of this case." Excerpts From Oral Arguments in the Supreme Court, App. F at 37a. Nevertheless, presumably out of respect for and in deference to the Court of Appeals, the Supreme Court proceeded to decide the case on its merits as specifically urged by the Court of Appeals in its Clarification Order. Clarification Order, App. D at 22a.

2. The Supreme Court Erred by Applying the Wrong Standard of Review in this Summary Judgment Proceeding.

This case was before the Court of Appeals on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. As such, the court properly "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact . . . . [The court] must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999). Furthermore, "the issue of material fact required by

Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence . . . . Put another way, if a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied." *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630-31 (9th Cir. 1987).

The Supreme Court, by deciding the "ultimate issue" in disposing of this case, either ignored or overlooked the above-referenced summary judgment review standards when it decided that "[t]he exchange of letters with which we are presented does not constitute a contract to negotiate." Supreme Court Opinion, App. C at 17a. The Court of Appeals by simply adopting the Supreme Court's "explanation" of Washington law similarly concluded that "Keystone's evidence does not suffice to establish a contract to negotiate." Court of Appeals Opinion, App. B at 7a. However, for summary judgment purposes Keystone was not required to conclusively prove the "ultimate issue in this specific case" as to whether a contract to negotiate was actually formed between the parties. Rather, considering all the evidence in a light favorable to its position, Keystone was only required to demonstrate that "a rational trier of fact might resolve the issue" of contract formation in favor of Keystone. Thus, the well-established standard of review and burden of proof applicable to summary judgment proceedings were inexplicably disregarded in both the Supreme Court's and Court of Appeals' opinions.

3. As Acknowledged by the Court of Appeals, the Facts in this Summary Judgment Proceeding Are Not Established and Disputed.

As clearly recognized by the Supreme Court, in contract formation cases the issue of "mutual assent is normally a question of fact for the jury."[4] Yet, the Supreme Court decided this case based exclusively on its review of a "summary of facts" included in the Court of Appeals Certification Order. These facts were provided for the exclusive purpose of establishing a contextual background for the court's benefit in responding to the certified question. However, the facts of this case were never determined by stipulation, findings of a court or otherwise and they remain unresolved.

Furthermore, assuming as indicated by the Supreme Court that Washington law would enforce at least certain agreements to negotiate, the Court of Appeals specifically concluded that "there are genuinely disputed material facts [in this case] that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it." Certification Order, App. E at 32a. Despite the Court of Appeals' specific finding relative to the existence of disputed material facts, the Supreme Court erroneously decided this summary judgment proceeding on its merits. This decision was in direct conflict with the Court of Appeals' Certification Order which specifically provided that "a trial will be necessary" to resolve these contested factual issues. *Id.*

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[4] Supreme Court Opinion, App. C at 16a, fn. 10.

Finally, the Supreme Court's decision that a contract to negotiate was not formed in this case was based exclusively on its review of the "exchange of letters with which we are presented." Supreme Court Opinion, App. C at 17a. However, Washington's context rule of contract interpretation requires the intentions of contracting parties to be ascertained by "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222, 228 (1990). The Supreme Court's contract formation decision ignores the critical importance of the context of the negotiations between the parties in evaluating their intentions.

4. In Any Event, the Determination of Facts and Application of Law to the Facts of a Case Are Both Inappropriate Functions of the Certification Process and Beyond the Scope of Washington's Certification Statute.

Recognizing that the function of certification is limited to answering unresolved questions of local law, it is well-settled that neither fact-finding nor application of law to the particular facts of a case should appropriately be considered by a court acting under the limited authority of a certification order. *See, e.g. Green v. American Tobacco Company*, 325 F.2d 673, 676 (5th Cir. 1963) (after receiving an answer to a certified question, the federal court ordered a second jury trial because "there was evidence from which the jury could properly conclude that the standard of reasonableness had been breached"); *In re Richards*, 223 A.2d 827, 833 (Me. 1966) (the Supreme Court of Maine refused to answer a certified question because it was apparent from the

certification itself that all material facts were not resolved); *Santasucci v. Gallen*, 607 F.2d 527, 529 (1st Cir. 1979) (rejection of certification by the district court was approved because "[u]nderlying the many difficult legal issues relating to the land claims are a number of disputed factual issues"); *Baker v. America's Mortg. Servicing, Inc.*, 58 F.3d 321, 325 (7th Cir. 1995) ("There may be difficulties in applying Illinois law to the particular facts of a case, but those are not problems which the certification procedure is intended to address"); *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992) (contract interpretation cases are particularly inappropriate for certification because the court "must look to the particularized language before it and the particularized negotiations between the parties in construing contractual documents"). *See also*, *Pflueger v. Sherman*, 293 U.S. 55 (1934), a case in which this Court refused to answer a question certified to it which involved mixed questions of law and fact, because "[t]he Court cannot be called upon to answer questions of objectionable generality, or to review proceedings, facts and circumstances for the purpose of deciding a variety of preliminary questions in order to reach and decide an ultimate question submitted." *Id.* at 58.

Consistent with the purpose of certification, Washington's Federal Court Local Law Certificate Procedure Act also specifically limits the jurisdiction of the Supreme Court to "answer[ing] the question of local law involved." RCW 2.60.020. Similarly, the federal court's right to request certification in Washington is expressly confined to situations in which "it is necessary to ascertain the local law of this state." *Id.* Thus, the Supreme Court's decision in this case exceeded the limited scope of its jurisdiction over federal court cases as clearly granted by Washington statutory law. The Court of Appeals' request for the Supreme Court to

request for the Supreme Court to dispose of this case was also not authorized by Washington law.

5. Keystone Never Had the Opportunity to Argue this Case Based on the Elements Established by the Supreme Court for a Contract to Negotiate.

The Supreme Court's opinion ***for the first time*** contains a pronouncement of Washington contract law regarding the requirements for an enforceable contract to negotiate. The Supreme Court stated that for such an agreement to be enforceable the parties must "exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time . . . . [The contract must include] an agreement as to how the parties were required to proceed." Supreme Court Opinion, App. C at 17a-18a. Although the Supreme Court concluded that "Keystone fails to identify an offer and acceptance to be bound to specific standards of negotiating conduct for the formation of a separate substantive contract,"[5] Keystone's deficiency in this respect is attributable to the fact that, prior to the Supreme Court's decision, it had no knowledge of or reason to know the elements required to be proven in order to establish the existence of an agreement to negotiate. It is fundamental that in summary judgment proceedings "while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). Therefore, prior to the Supreme Court's announcement of Washington contract law relative to agreements to negotiate, Keystone was unable to ascertain the

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[5] Supreme Court Opinion, App. C at 16a.

materiality of the facts which should have been presented for the courts' consideration. Unless the Court of Appeals' decision is reversed, Keystone will never have this opportunity.

II. REVIEW IS WARRANTED BECAUSE BOTH THE SUPREME COURT'S AND COURT OF APPEALS' DECISIONS ARE IN DIRECT CONFLICT WITH THE COURT OF APPEALS' CERTIFICATION ORDER IN THIS CASE.

The Court of Appeals' Certification Order, as clarified, requested the Supreme Court to elect to either: (a) provide "an opinion as applied to this case . . . [in order] to make the certified question dispositive of the case," or (b) "limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and enforceable." Clarification Order, App. D at 22a. The Supreme Court, as outlined above, accepted the Court of Appeals' invitation to dispose of the case on its merits. Although the Supreme Court specifically declined to declare whether Washington contract law would ever enforce an agreement to negotiate a future contract, its opinion clearly delineated the following essential requirements for the existence of such a contract: an exchange of promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. The Supreme Court, at least by implication, confirmed that Washington law would recognize an agreement to negotiate containing these elements.

In its Clarification Order the Court of Appeals clearly indicated that "if the Washington State Supreme Court prefers to limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and

enforceable, then we will apply that law in further proceedings in this appeal." Clarification Order, App. D at 22a. Importantly, the Court of Appeals' original Certification Order concludes as follows:

> Conversely, if the Washington State Supreme Court decides to recognize a contract to negotiate in this case, ***we will reverse the district court's order granting summary judgment to Xerox.*** As we will explain if it is necessary, ***there are genuinely disputed material facts*** that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it. ***In this case, a trial will be necessary.***

Certification Order, App. E at 32a (emphasis added).

Ignoring the standards of review applicable to summary judgment motions, as well as Washington's context rule for contract interpretation, the Supreme Court's opinion is based on its inaccurate or misguided assumption that no dispute existed as to the relevant facts of this case. Yet, the Court of Appeals specifically emphasized the existence of "genuinely disputed material facts" relating to the decisive issue of the formation of a contract to negotiate. As determined by the Court of Appeals, a trial is necessary to resolve the disputed facts.

The opinions of both the Supreme Court and the Court of Appeals relative to the formation of a contract to negotiate cannot be reconciled with the Court of Appeals' Certification Order. Assuming Washington law will enforce at least certain agreements to negotiate, the Certification Order clearly contemplated the necessity of a trial in this case to

resolve disputed issues of material fact relative to both the formation and breach of the contract. However, the Supreme Court, as endorsed by the Court of Appeals' opinion, summarily decided this case based exclusively on its determination that a contract to negotiate had not been formed between the parties. Such a decision ignored both the existence of disputed facts as expressly acknowledged by the Certification Order and the fact that Keystone, for purpose of summary judgment, in any event did not have the burden of conclusively proving the contract's existence.

Because the Supreme Court effectively disposed of *Keystone v. Xerox* based on the determination that a contract had not been formed, its decision had the practical effect of "overruling" the Court of Appeals' specific findings as to the need for a federal judge or jury to resolve "genuinely disputed material facts." Although the Certification Order specifically required the disputed issues of material fact relative to contract formation to be decided by the District Court at trial, the Supreme Court superceded this determination by inconsistently concluding that the factual disputes specifically acknowledged by the Court of Appeals did not even exist. Amazingly, such a conclusion was predicated exclusively on the Supreme Court's superficial review of the condensed "summary of facts" included in the Certification Order. Such an extreme result was never contemplated by the certification process and is inconsistent with the federal court system's exclusively jurisdictional responsibility for deciding this case.

III. REVIEW IS FURTHER WARRANTED BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS IN PRINCIPLE, IF NOT DIRECTLY, WITH PRIOR DECISIONS OF THIS COURT.

This Court has specifically recognized that "[p]arties are entitled – absent unique and rare situations – to adjudication of their rights in the tribunals which Congress has empowered to act." *Clay v. Sun Insurance Office Limited*, 363 U.S. 207, 228 (1959) (Douglas, J. dissenting). In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1963), this Court specifically considered a judicial abstention case in which the federal court deferred considering the litigants' constitutional claims pending the state court's determination of the application of a state licensing statute to the dispute.[6] In a decision which recognized the federal court's overarching responsibility for deciding cases properly subject to its jurisdiction, this Court in *England* commented as follows as to the critical importance of the federal court's role as the final decision maker in inter-jurisdictional cases:

> Limiting the litigant to review here [in abstention cases] would deny him the benefit of a federal trial court's role in constructing a record and making fact

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[6] Abstention, similar in concept to certification, is a judge-fashioned vehicle for allowing state courts to resolve undecided questions of state law under the Erie doctrine. Procedurally, abstention involves a somewhat cumbersome process requiring the litigants to commence a separate lawsuit in state court, with the federal court holding the case in abeyance pending the state court's answer to the state law question. The more streamlined certification process has emerged in response to the procedural shortcomings of federal court abstention. *Uniform Certification of Questions of Law Act* (U.L.A.), Prefatory Note.

> findings . . . . "There is always in litigation a margin of error, representing error in factfinding . . . ." ***Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination*** . . . . We made this clear only last Term in *NAACP v. Button*, when we said that "***a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim.***"

England at 416-17 (internal citations omitted) (emphasis added).

As a direct consequence of the Court of Appeals' abdication of responsibility in this case, Keystone's right to return to federal court for both fact-finding and case disposition was disregarded. Instead, these important judicial functions were actually completed by the Supreme Court based on a jurisdictional authorization improperly conferred by the Court of Appeals. The importance of Keystone's absolute right to have its claims determined in federal court was emphasized by this Court in both *Clay* and *England*. Consequently, the Court of Appeals' decision is in direct conflict with the principles established in these cases.

CONCLUSION

The Supreme Court of Washington is the final arbiter of Washington law. To the limited extent that the Supreme Court's opinion "answered a question of local law," the Court of Appeals was required to apply such law in its disposition of this case. However, because it should never have

requested or allowed the Supreme Court to decide this case, the Court of Appeals must be ordered to disregard the Supreme Court's conclusions relative to the formation of a contract between Xerox and Keystone. Instead, as the Court of Appeals expressly concluded in its Certification Order, the existence of disputed issues of material fact requires this case to be remanded to the District Court for trial. The jury in District Court must then apply Washington contract law relative to agreements to negotiate, as recently promulgated by the Supreme Court, to the facts the jury determines to be relevant based on the evidence presented at trial. Only then can this case be decided on its merits.

Accordingly, Keystone's petition for a writ of certiorari should be granted. Further, Keystone also respectfully requests the Court to order the summary reversal of the Court of Appeals' decision.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 02-35847

D.C. No. Cv-01-01018-MJP
Western District of Washington, Seattle

[Filed September 7, 2004]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff-Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION, Defendant-Counter-Claimant-Appellee.	)

ORDER

Before: TROTT, FISHER, and GOULD, Circuit Judges.

The Petition for Reheating is **DENIED**.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-35847

[Filed August 4, 2004]

[Resubmitted August 4, 2004, Seattle, Washington]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff-Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION, Defendant-Counter-Claimant-Appellee.	)

Before: Stephen S. Trott, Raymond C. Fisher, and Ronald M. Gould, Circuit Judges. Opinion by Judge Gould.

OPINION: SECOND OPINION

GOULD, Circuit Judge:

This diversity case arises from a contract dispute. Plaintiff Keystone Land & Development Company ("Keystone") claims that it formed two binding contracts with Defendant Xerox Corporation ("Xerox"): a contract to buy a building owned by Xerox, and a contract to negotiate the terms of a Purchase and Sale Agreement for that building. Keystone filed suit for breach of contract in Washington state court and, to secure its claims, Keystone filed a *lis pendens* notice for the property. Xerox removed the case to federal court and filed a counterclaim for damages, and attorney's fees, caused by an allegedly improper *lis pendens*. The district court granted summary judgment to Xerox on its defense of the two contract claims asserted by Keystone, and also granted summary judgment to Xerox on its counterclaim. Keystone appealed these rulings.

In a separate opinion, *Keystone Land & Development Co. v. Xerox Corp.*, 353 F.3d 1070 (9th Cir. 2003) (*Keystone I*), we affirmed the summary judgment dismissing Keystone's claim of a breach of contract to sell the building, and we reversed the summary judgment awarding damages to Xerox because of the *lis pendens*.

In a companion published order, *Keystone Land & Development Co. v. Xerox Corp.*, 353 F.3d 1093 (9th Cir. 2003) (*Keystone II*), we certified to the Washington State Supreme Court a remaining dispositive question of state law before us, namely, whether Washington law may recognize a contract to negotiate in the circumstances presented by this appeal. The Washington State Supreme Court accepted certification and has resolved the dispositive question that we certified to it. We now return to consideration of the issues that we had deferred while awaiting an answer on state law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court.

I

We reiterate the facts as set forth in our prior published order in *Keystone II*. In early 2001, Xerox decided to sell and leaseback its facility in Tukwila, Washington. Xerox hired Jones Lang LaSalle ("Jones Lang") and Kidder Matthews and Sanger ("Kidder Matthews") to sell the property. Xerox sent detailed information packets to prospective buyers, including Keystone. In a February 22, 2001 e-mail, Xerox requested a "signed Letter of Intent which includes the net purchase price and key deal points . . . ." Keystone, through its real estate broker, Broderick Group, sent a letter (the "Offer Letter") dated March 8, 2001, that made an "Offer to Purchase" the property. The letter had several contingencies, including the "Execution of a Purchase and Sale Agreement with [sic] thirty (30) days from the execution of this letter of intent." Kidder Matthews replied on April 4, 2001, thanking Keystone for the "Offer" and, as "directed by Xerox," requested that Keystone submit a "final and best offer" for the property that addressed certain concerns. Keystone responded through a letter dated April 6, 2001, by increasing its offering price. Referencing the March 8 letter, the April 6 letter stated that Keystone was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement." In an April 10th letter, Xerox's local brokers wrote that, subject to two modifications, Xerox was "prepared to negotiate a Purchase and Sale Agreement with Keystone," and that Xerox would "proceed immediately to draft" the Agreement if Keystone accepted the modifications. Keystone accepted the modifications on April 13th.

Keystone prepared to inspect the property and Xerox's books and records concerning the property, reviewed documents, and arranged debt and equity financing. Xerox delivered documents to Keystone and hired legal counsel for

drafting the Agreement. Xerox told Keystone that a draft was almost complete and would soon be ready for review. To this point, no employee of Keystone had discussed the transaction directly with any employee of Xerox; all communications were between the parties' brokers.

Xerox commenced its due diligence review. Because Xerox had seen other prospective property sales collapse when lenders had backed out after learning that the deal included a leaseback to Xerox, it requested assurances from Keystone's lenders that financing would be available. Faced with vague answers from Keystone's financier, a Key Bank officer, Xerox became concerned about Keystone's suitability as purchaser and landlord.

On April 25, 2001, the City of Tukwila, the main competitor of Keystone for the property, submitted a revised proposal to buy the building for $500,000 more than Keystone offered. Xerox then decided to withdraw from negotiations with Keystone. That was the end of negotiations between Keystone and Xerox.

Keystone filed suit in state court on June 20, 2001 and recorded a *lis pendens* against the Tukwila facility. The action was removed by Xerox to the United States District Court for the Western District of Washington. Xerox filed a Fed. R. Civ. P. 12(b)(6) motion, asserting that the complaint did not state a claim. That motion was denied. Xerox then filed an answer on October 4, 2001, and added a counterclaim for damages from the *lis pendens* filing. Keystone released the *lis pendens* when it filed an amended complaint on January 18, 2002. On cross-motions for summary judgment, the district court granted Xerox's motion for summary judgment in defense of Keystone's suit on March 14, 2002. On July 12, 2002, the district court, addressing cross-motions for

summary judgment on Xerox's counter-claim, awarded summary judgment to Xerox. The district court certified both orders as final and Keystone appealed both summary judgment orders.

* * *

We have already affirmed summary judgment for Xerox on Keystone's claim of breach of contract to sell the Tukwila building and we have reversed summary judgment for Xerox on the *lis pendens* counterclaim and ordered summary judgment for Keystone. *Keystone I*, 353 F.3d at 1077. Our consideration now addresses and, in accord with the law as determined by the Washington State Supreme Court on our certified questions, resolves Keystone's challenge to the district court's grant of summary judgment that rejected Keystone's claim of breach of contract to negotiate.

II

On December 31, 2003, we certified the following two questions to the Washington State Supreme Court:

> (1) Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?
>
> (2) If such a contract can exist, what is the proper measure of damages for the breach of a contract to negotiate?

Keystone II, 353 F.3d at 1098. After accepting certification, calling for briefing, and holding oral argument, the

Washington State Supreme Court responded: "We do not reach the issue of whether Washington contract law will ever recognize and enforce an agreement to negotiate a future contract but answer the first question, under the circumstances presented in this case, no. We find it unnecessary to reach the second certified question.", *Keystone Land & Dev. Co. v. Xerox Corp.*, ___ P.3d ___, No. 74904-3, 152 Wn.2d 171, 94 P.3d 945, 2004 Wash. LEXIS 537, (Wash. July 22, 2004) (*Keystone III*). The Washington State Supreme Court elaborated:

We conclude that it is unnecessary to decide whether Washington will ever enforce a contract to negotiate in order to answer the first certified question. The exchange of letters with which we are presented does not constitute a contract to negotiate. The parties did not exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Instead, the parties began negotiations to enter into a purchase and sale agreement. In the absence of objective manifestations of mutual assent to definite terms supported by consideration, no contract was formed. There was never an agreement as to how the parties were required to proceed.

Under Washington law, as explained by the Washington State Supreme Court, Keystone's evidence does not suffice to establish a contract to negotiate.

III

As we have previously held, this interpretation of Washington law ends the appeal: "If the Washington State Supreme Court gives an opinion that it does not recognize a contract to negotiate in this case, we will affirm the district

court on that basis." *Keystone II*, 353 F.3d at 1098. We therefore affirm the district court's grant of summary judgment to Xerox based on the answer provided by the Washington State Supreme Court. We also express gratitude to the Washington State Supreme Court for accepting and resolving the certified question that is dispositive of this appeal. We will not disturb the district court's decision on summary judgment rejecting Keystone's claim of breach of contract to negotiate.

AFFIRMED.

In light of the partial relief given Keystone in *Keystone I*, the partial affirmance given Xerox in *Keystone I*, and our rejection of Keystone's remaining appeal here, each party shall bear its own costs.

APPENDIX C

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 74904-3

[Filed July 22, 2004]

KEYSTONE LAND & DEVELOPMENT COMPANY, Appellant	)
v.	)
XEROX CORPORATION, Appellee	)

SUPREME COURT OF WASHINGTON

EN BANC OPINION

CHAMBERS, J.

Keystone Land & Development Company (Keystone) claims Xerox Corporation (Xerox) breached two separate contracts: one to sell its Tukwila facility to Keystone and one to negotiate in good faith a purchase and sale agreement for

the facility. The United States District Court for the Western District of Washington granted Xerox's motion for summary judgment and dismissed Keystone's claims under both contracts. Keystone appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed summary judgment dismissal of Keystone's claims under the substantive contract but seeks this court's answers to two certified questions before deciding the remaining issue on appeal.

(1) Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?

(2) If such a contract can exist, what is the proper measure of damages for the breach of a contract to negotiate?

Keystone Land & Dev. Co. v. Xerox Corp., 353 F.3d 1093, 1098 (9th Cir. 2003).[1] We do not reach the issue of whether Washington contract law will ever recognize and enforce an agreement to negotiate a future contract but answer the first

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[1] After we heard oral arguments on the matter, upon Keystone's request, and over Xerox's objection, the Ninth Circuit issued an order clarifying its intent "to make the[se] certified questions dispositive of th[is] case," while acknowledging our ability to reformulate the questions and limit our opinion to "a general statement of Washington contract law." June 17, 2004 Order at 2. Following the Ninth Circuit's clarification order, Keystone moved this court for permission to submit supplemental briefing on the issue of whether we ought to limit our opinion to a general statement of Washington contract law. Because supplemental briefing is unnecessary, Keystone's motion for permission to submit supplemental briefs is denied.

question, under the circumstances presented in this case, no. We find it unnecessary to reach the second certified question.

FACTS

Xerox decided to sell and leaseback a facility it owned in Tukwila, Washington. Xerox's brokers[2] sent out detailed information packets to prospective buyers, including Keystone, and requested letters of intent containing net purchase price and key deal points. Xerox received many proposals. It was most interested in the proposals received from Keystone and the City of Tukwila and directed its local broker, Kidder, to seek final, best offers from both. Parallel negotiations occurred with Keystone and the City of Tukwila.[3] Keystone claims that the exchange of letters between its broker[4] and Xerox's local broker created two enforceable contracts.[5]

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[2] Xerox hired Jones Lang LaSalle, Inc. to sell the facility, and Jones associated with local real estate broker, Kidder Matthews & Sanger, Inc. (Kidder).

[3] On April 25, 2001, the City of Tukwila's broker responded with its final and best offer, which included a purchase price offer of $500,000 more than the offer made by Keystone. Additionally, the city revised its offer to include a longer leaseback term meeting Xerox's needs.

[4] Broderick Group, Inc. (Broderick).

[5] The District Court found, and the Ninth Circuit affirmed, no substantive contract for the sale and purchase of the facility was formed. *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1070, 1075 (9th Cir. 2003) (hereinafter *Keystone* II).

Through Broderick, Keystone responded to the information packet it received and sent a letter to Kidder titled "offer of purchase." Excerpt of Record (ER) at 9-15. Kidder then sent a letter to Broderick and requested a "final and best offer" that would address some "critical issues," including the purchase price, rent, deposit, and closing date. ER at 93. Broderick responded with a letter back to Kidder amending the purchase price and noting the offer to purchase would expire if not accepted on or before April 16, 2001. On April 10, 2001, Kidder replied and noted that "Xerox is prepared to negotiate a Purchase and Sale Agreement with Keystone Development subject to two modifications to your Proposal."[6] On April 13, 2001,[7] Keystone's president acknowledged and accepted the modifications to its proposal. App. Keystone contends that all of the key terms of the substantive agreement were settled by Keystone's acceptance of the April 10, 2001, letter and that Xerox was obligated to prepare a purchase and sale agreement.

ANALYSIS

We begin by distinguishing between three different but similar types of agreements. The first type of agreement is an agreement to agree. An agreement to agree is "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete." *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428

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[6] Appendix to this opinion (ER at 18) (hereinafter cited as "App.").

[7] Although the April 10, 2001, letter to Broderick stated that it will expire if not accepted by noon on April 12, 2001, Keystone's president unilaterally changed the expiration date to 5:00 p.m. on April 13, 2001.

(1957). Agreements to agree are unenforceable in Washington. *Id.* (citing cases).[8]

The second type of agreement is an agreement with open terms. Under an agreement with open terms, the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source, such as the Uniform Commercial Code. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 253 (1987) [hereinafter *Preliminary Agreements*].[9]

The third type of agreement is a contract to negotiate. In a contract to negotiate, the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Under a contract to negotiate, the parties do not intend to be bound if negotiations fail to reach ultimate agreement on the substantive deal. *Preliminary*

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[8] We note, however, that this line of cases has been distinguished from another line of cases in which the enforceability of contract terms to agree upon future rental rates contained within renewal options of completed lease agreements was established. *See, e.g., Family Med. Bldg., Inc. v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 110, 702 P.2d 459 (1985).

[9] Keystone's arguments about the substantive contract appear to hinge on the formation of an agreement with open terms. As noted above, the federal courts have already held there was no binding agreement with open terms for the purchase and sale of the facility. *See supra* n.5; *see also Keystone* II, 353 F.3d at 1075. This question is not before the court.

Agreements, 87 COLUM. L. REV. at 263. In contrast to an agreement to agree, under a contract to negotiate, no breach occurs if the parties fail to reach agreement on the substantive deal. The contract to negotiate is breached only when one party fails to conform to the specific course of conduct agreed upon. No Washington court has directly addressed whether a contract to negotiate is independently enforceable.

Under the principle of freedom to contract, parties are free to enter into, and courts are generally willing to enforce, contracts that do not contravene public policy. *Preliminary Agreements*, 87 COLUM. L. REV. at 267. Xerox does not argue that contracts to negotiate are against public policy. Rather, it argues that, under existing Washington case law, when parties manifest, in any way, that legal obligations shall be deferred until a writing is made, preliminary negotiations and agreements do not constitute a binding contract.

Keystone argues that Washington courts, while not deciding the issue, have implied the enforceability of a contract to negotiate. For example, in *Badgett v. Security State Bank,* 116 Wn.2d 563, 807 P.2d 356 (1991), borrowers sought to modify an existing loan agreement, and when the bank refused to consider the borrowers' proposal, the borrowers brought suit claiming the bank breached a duty to negotiate modifications in good faith. *Id.* at 566-67. In holding the bank was under no obligation to negotiate modifications in good faith, we implied that if there had been an express provision in the loan agreement imposing such a duty, then it would have been enforceable. *Id.* at 573 ("[T]he Badgetts are not asking this court to interpret any provision in the loan agreement as imposing a duty on the Bank to consider their proposals...").

Our holding in *Badgett* supports a conclusion that, under Washington contract law, a specific course of conduct agreed upon for future negotiations is enforceable when it is contained in an existing substantive contract. However, *Badgett* does not answer the question of whether an enforceable obligation to negotiate in accordance with an agreed upon course of conduct can exist independently from an existing substantive contract. Although there is a duty of good faith and fair dealing implied in all existing contracts, we have consistently held there is no "free-floating" duty of good faith and fair dealing that is unattached to an existing contract. *E.g.*, *id.* at 569-70. The duty exists only "in relation to performance of a specific contract term." *Id.* at 570.

Washington follows the objective manifestation test for contracts. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998). Accordingly, for a contract to form, the parties must objectively manifest their mutual assent. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Moreover, the terms assented to must be sufficiently definite. *Sandeman*, 50 Wn.2d at 541 (observing if a term is so "indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties," there cannot be an enforceable agreement). Additionally, the contract must be supported by consideration to be enforceable. *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). Washington's requirements for valid contract formation adequately address the primary concern of other courts that have considered the enforceability of contracts to negotiate. As stated by one federal court, the primary concern is to "avoid trapping parties in surprise contractual obligations." *Teachers Ins. & Annuity Ass'n v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987).

In order to answer the certified questions, we must first determine whether a contract to negotiate was formed under the circumstances of this case. Xerox claims that there was no manifestation of mutual assent to be bound to specific standards of negotiating conduct.[10] Generally, manifestations of mutual assent will be expressed by an offer and acceptance. *City of Yakima*, 122 Wn.2d at 388. Keystone identifies letters between the parties' brokers that it contends are an offer, counter-offers, and acceptance. However, Keystone fails to identify an offer and acceptance to be bound to specific standards of negotiating conduct for the formation of a separate substantive contract.

Alternatively, Keystone alleges that statements made by Xerox's brokers regarding Xerox's intentions to proceed with the negotiations amount to an unconditional commitment to prepare the purchase and sale agreement that would have formalized its alleged commitment to sell the facility to Keystone. The relevant statements are contained in the April 10, 2001, letter from Kidder to Broderick. *See* App. First, Kidder states "Xerox is prepared to *negotiate* a Purchase and Sale Agreement with Keystone Development subject to two modifications to your Proposal." App. (emphasis added). At most, the statement is a manifestation of Xerox's intention to negotiate with Keystone. There is no objective manifestation by Xerox of an intent to be bound if Keystone accepts the

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[10] Whether there was mutual assent is normally a question of fact for the jury. *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). A question of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. King County*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

modifications. *See Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 556, 608 P.2d 266 (1980) (holding an intention to do something "is evidence of a future contractual intent, *not the present contractual intent essential to an operative offer*") (emphasis added). On the contrary, the statement evidences an intent not to be bound by expressly referencing the need for further negotiations. *See Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) (holding "reference to a binding sales agreement to be completed at some future date" is evidence of a present intent *not* to be bound).

Second, Kidder states that if Keystone acknowledges acceptance of the modifications to its proposal "[w]e can then proceed immediately to draft the Purchase and Sale Agreement for review and execution." App. Again, this statement does not manifest a present contractual intent to be bound upon Keystone's acceptance. *See Nimmer*, 25 Wn.App. at 556. Rather, the statement is an objective manifestation of Xerox's intent not to be bound because of its express reference to a future binding agreement being "review[ed] and execut[ed]." App.; *see Arcadian*, 884 F.2d at 72.

We conclude that it is unnecessary to decide whether Washington will ever enforce a contract to negotiate in order to answer the first certified question. The exchange of letters with which we are presented does not constitute a contract to negotiate. The parties did not exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Instead, the parties began negotiations to enter into a purchase and sale agreement. In the absence of objective manifestations of mutual assent to definite terms supported by consideration, no contract was formed. *See King*, 125 Wn.2d at 505; *City of Yakima*, 122

Wn.2d at 388; *Sandeman*, 50 Wn.2d at 541. There was never an agreement as to how the parties were required to proceed.

Keystone asks us to imply a duty to continue negotiations until a final agreement is reached. In fact, Keystone argues that the question before us is not whether the parties agreed to an enforceable duty to negotiate. Instead, it argues the question is "whether the negotiations between Keystone and Xerox had advanced to the point *where the law should impose on the parties a 'duty to go forward*[.]'"[11] We decline to create and impose a duty to go forward in the absence of an enforceable contract. No contract was formed between Keystone and Xerox. At best, the circumstances of this case present an implied agreement to agree. We adhere to our long standing jurisprudence that agreements to agree are unenforceable. *Sandeman*, 50 Wn.2d at 541-42; *Wharf Rest., Inc. v. Port of Seattle*, 24 Wn. App. 601, 609, 605 P.2d 334 (1979); *Johnson v. Star Iron & Steel Co.*, 9 Wn.App. 202, 206, 511 P.2d 1370 (1973).[12]

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[11] Br. of Keystone Land & Dev. Co. at 32 (emphasis added).

[12] Compare also Coleman v. St. Paul & Tacoma Lumber Co., 110 Wash. 259, 270, 188 P. 532 (1920) (holding letters did not form a contract when the objective purpose was "to open negotiations which might possibly lead to a contract") and *Weldon v. Degan*, 86 Wash. 442, 450, 150 P. 1184 (1915) (""'If any portion of the proposed terms [of the contract] are not settled or a mode agreed upon by which they may be settled, there is no agreement.'"" (quoting 9 Cyc. 245) (alteration in original)).

CONCLUSION

The circumstances of this case present us, at best, with an implied agreement to agree. We adhere to our long standing jurisprudence that agreements to agree are unenforceable. Consequently, our answer to the first certified question is no, Washington will not enforce a contract under the circumstances of this case. We do not reach the question of whether contracts to negotiate are enforceable under Washington contract law because this case does not present a contract to negotiate. We find it unnecessary to reach the second certified question concerning the measure of damages.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 02-35847

D.C. No. Cv-01-01018-MJP
Western District of Washington, Seattle

[Filed June 17, 2004]

KEYSTONE LAND & DEVELOPMENT COMPANY,	)
Plaintiff-Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION,	)
Defendant-Counter-Claimant-Appellee.	)

ORDER

Before: TROTT, FISHER, and GOULD, Circuit Judges.

Before us is Keystone Land and Development Company's ("Keystone") "Motion for Clarification of Certification

Order," filed June 7, 2004. Xerox Corporation has filed a response in opposition to the motion.

From our perspective, the issue certified to the Washington State Supreme Court remains as we stated in our certification order:

> If the Washington State Supreme Court gives an opinion that it does not recognize a contract to negotiate in this case, we will affirm the district court on that basis. Conversely, if the Washington State Supreme Court decides to recognize a contract to negotiate in this case, we will reverse the district court's order granting summary judgment to Xerox. As we will explain if it is necessary, there are genuinely disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it. In this case, a trial will be necessary.

Keystone Land & Dev. Co. v. Xerox Corp., 353 F.3d 1093, 1098 (9th Cir. 2003).

Keystone asserts in its motion that the Washington State Supreme Court is hesitant to resolve the certified questions as we have framed them. Xerox asserts that the motion is untimely, that clarification is unnecessary, and that the requested clarification is unfair. We have reviewed the briefing presented by the parties on the motion, and also have reviewed the parties' argument presented before the Washington State Supreme Court. We acknowledge that there were some expressions of concern by members of the court to deciding the ultimate issue in this specific case, as opposed to providing a general statement of Washington contract law.

We reject Xerox's argument that the motion is untimely, for it does address issues of concern raised by the Washington State Supreme Court. As for whether clarification is necessary, we did frame our questions, as quoted above, to inquire about recognition of a contract to negotiate, and we further did ask for an opinion as applied to this case. We framed the issues in this way to make the certified question dispositive of the case, with the view that would make it more likely that the Washington State Supreme Court would be willing to accept certification, spend its valuable time, and express its view on the applicable Washington law of contract. At the same time, we did not intend to burden the Washington State Supreme Court with any issue that it does not wish to resolve.

Along these lines, in our prior certification order we explicitly said that "the Washington State Supreme Court... may in its discretion reformulate the questions." *Id.* (citing *Broad v. Mannesmann Anlagenbau AG,* 196 F.3d at 1076 (9th Cir. 1999)). In response to the motion to clarify, we direct the attention of the parties and the Washington State Supreme Court to this particular language, which ensures that the issues may be reframed in a manner entirely agreeable to the Washington State Supreme Court. We appreciate that it has taken the time on its crowded docket to accept certification, to address issues posed by this case, and to hear oral argument, with the aim to render an opinion.

If the Washington State Supreme Court wants to answer the question as we certified it, it will be dispositive of this appeal. Conversely, if the Washington State Supreme Court prefers to limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and enforceable, then we will apply that law in further proceedings in this appeal. Because our order contemplates

that the Washington Supreme Court has discretion to reformulate our questions to its liking, we will act in accord with whatever guidance on Washington law is given to us.

Beyond these clarifying comments, we see no need to further clarify the certified questions. In the interest of facilitating the Washington State Supreme Court's consideration of the state law question presented by this case, the motion for clarification is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-35847

[Filed December 31, 2003]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff-Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION, Defendant-Counter-Claimant-Appellee.	)

Before: Stephen S. Trott, Raymond C. Fisher, and Ronald M. Gould, Circuit Judges. Order by Judge Gould.

OPINION & ORDER

GOULD, Circuit Judge.

This diversity case arises from a contract dispute. Plaintiff Keystone Land & Development Company ("Keystone") claims that it formed two binding contracts with Defendant

Xerox Corporation ("Xerox"): a contract to buy a building owned by Xerox, and a contract to negotiate the terms of a Purchase and Sale Agreement for that building. Keystone filed suit for breach of contract in Washington state court and, to secure its claims, Keystone filed a *lis pendens* notice for the property. Xerox removed the case to federal court and filed a counterclaim for damages, and attorney's fees, caused by an allegedly improper *lis pendens*. The district court granted summary judgment to Xerox on its defense of the two contract claims asserted by Keystone, and also granted summary judgment to Xerox on its counterclaim. Keystone appealed these rulings. We had jurisdiction pursuant to 28 U.S.C. § 1291. In an opinion filed concurrently with this order, we affirmed the summary judgment dismissing Keystone's claim of a breach of contract to sell the building, and we reversed the summary judgment awarding damages to Xerox because of the *lis pendens*. This order certifies to the Washington State Supreme Court the remaining dispositive[13] question of state law before us, namely, whether Washington law may recognize a contract to negotiate in the circumstances presented by this appeal.

I

Before turning to the issue to be certified, we provide the following summary of facts. In early 2001, Xerox decided to sell and leaseback its facility in Tukwila, Washington. Xerox hired Jones Lang LaSalle ("Jones Lang") and Kidder Matthews and Sanger ("Kidder Matthews") to sell the

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[1] We conclude that whether a trial on the remaining contract claim in this case is necessary depends entirely upon the answer provided by the Washington State Supreme Court. The answer to our certified question is "necessary . . . to dispose of [our] proceedings." Wash. Rev. Code. § 2.60.020.

property. Xerox sent detailed information packets to prospective buyers, including Keystone. In a February 22, 2001 e-mail, Xerox requested a "signed Letter of Intent which includes the net purchase price and key deal points..." Keystone, through its real estate broker, Broderick Group, sent a letter (the "Offer Letter") dated March 8, 2001, that made an "Offer to Purchase" the property. The letter had several contingencies, including the "Execution of a Purchase and Sale Agreement with [sic] thirty (30) days from the execution of this letter of intent." Kidder Matthews replied on April 4, 2001, thanking Keystone for the "Offer" and, as "directed by Xerox," requested that Keystone submit a "final and best offer" for the property that addressed certain concerns. Keystone responded through a letter dated April 6th, 2001 by increasing its offering price. Referencing the March 8th letter, the April 6th letter stated that Keystone was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement." In an April 10th letter, Xerox's local brokers wrote that, subject to two modifications, Xerox was "prepared to negotiate a Purchase and Sale Agreement with Keystone," and that Xerox would "proceed immediately to draft" the Agreement if Keystone accepted the modifications. Keystone accepted the modifications on April 13th.

Keystone prepared to inspect the property and Xerox's books and records concerning the property, reviewed documents, and arranged debt and equity financing. Xerox delivered documents to Keystone and hired legal counsel for drafting the Agreement. Xerox told Keystone that a draft was almost complete and would soon be ready for review. To this point, no employee of Keystone had discussed the transaction directly with any employee of Xerox; all communications were between the parties' brokers.

Xerox commenced its due diligence review. Because Xerox had seen other prospective property sales collapse when lenders had backed out after learning that the deal included a leaseback to Xerox, it requested assurances from Keystone's lenders that financing would be available. Faced with vague answers from Keystone's financier, a Key Bank officer, Xerox became concerned about Keystone's suitability as purchaser and landlord.

On April 25, 2001, the City of Tukwila, the main competitor of Keystone for the property, submitted a revised proposal to buy the building for $500,000 more than Keystone offered. Xerox then decided to withdraw from negotiations with Keystone. That was the end of negotiations between Keystone and Xerox.

Keystone filed suit in state court on June 20, 2001 and recorded a *lis pendens* against the Tukwila facility. The action was removed by Xerox to the United States District Court for the Western District of Washington. Xerox filed a Fed. R. Civ. P. 12(b)(6) motion, asserting that the complaint did not state a claim. That motion was denied. Xerox then filed an answer on October 4, 2001, and added a counterclaim for damages from the *lis pendens* filing. Keystone released the *lis pendens* when it filed an amended complaint on January 18, 2002. On cross-motions for summary judgment, the district court granted Xerox's motion for summary judgment in defense of Keystone's suit on March 14, 2002. On July 12, 2002, the district court, addressing cross-motions for summary judgment on Xerox's counter-claim, awarded summary judgment to Xerox. The district court certified both orders as final and Keystone appealed both summary judgment orders.

In an opinion accompanying this order, we have affirmed summary judgment for Xerox on Keystone's claim of breach of contract to sell the Tukwila building. In the same opinion, we reversed summary judgment for Xerox on the *lis pendens* counterclaim and ordered summary judgment for Keystone. We have deferred decision on the appeal of Keystone challenging the district court's grant of summary judgment rejecting Keystone's claim of breach of contract to negotiate.

II

We turn to the issue that is the basis of our certification order[14]: whether Washington law recognizes a contract to negotiate. We certify this question because we conclude that the Washington State Supreme Court has not yet answered definitively whether a contract to negotiate can be enforceable in the circumstances presented in this case.

On the one hand, arguing against the possibility of an agreement to negotiate a future contract, Washington courts have held explicitly that "an agreement to negotiate a contract in the future is nothing more than negotiations." *Pacific Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 556, 608 P.2d 266 (1980) (citing *Johnson v. Star Iron & Steel Co.*, 9 Wn. App. 202, 206, 511 P.2d 1370 (1973)). *Johnson*, in turn, cites *Sandeman v. Sayres*, 50 Wn.2d 539, 314 P.2d 428 (1957) for its holding. *Sandeman* includes a statement that, "an agreement for an agreement, or in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be

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[2] Even though this course of action was not suggested by either party, we may properly certify this question *sua sponte*. *See* Wash. Rev. Code.

complete is unenforceable [sic]." *Id.* at 541-42. If we take this language from *Sandeman* literally, it might be read to preclude Keystone's claim of breach of contract to negotiate. That agreement might be viewed as requiring some further meeting of the minds to reach an agreement that is enforceable.

But our analysis of *Sandeman* suggests to us that the answer we set forth above is not necessarily conclusive. *Sandeman* did not precisely reject contracts for negotiation. The *Sandeman* language that we cite above, to the effect that there can be no enforceable "agreement to do something which requires a further meeting of the minds of the parties," *id.*, is ambiguous as applied to an agreement to negotiate. The *Sandeman* language might be interpreted to preclude using a § 2.60.030(1) ("certification procedure may be invoked by a federal court upon its own motion ...."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002) (ordering certification *sua sponte*) contract to negotiate to enforce the incomplete substantive contract, but need not necessarily be read to preclude enforcing a contract to negotiate, with nothing enforced except a duty to negotiate in good faith.

There is also some affirmative authority that, at least when a contract has been formed, Washington courts have recognized that there can be a contractual obligation to negotiate further agreements in good faith. *See, e.g., Family Medical Bldg, Inc. v. Dept. of Soc. and Health Servs.*, 37 Wn.App. 662, 667, 684 P.2d 77 & n.2 (1984) ("that is, G.A. had a duty to make a good faith effort to negotiate a rental and a duty to determine in good faith if the rate was acceptable...there was [a promise by the G. A.] to agree to an acceptable rate."), *aff'd in part on this ground, rev'd in part on other grounds*, 104 Wn.2d 105, 702 P.2d 459 (1985). And

the concept of a contract to negotiate has been explicitly recognized by a concurring opinion from the Washington Supreme Court. *See Hedges v. Hurd*, 47 Wn.2d 683, 689, 289 P.2d 706 (1955) (Hill, J., concurring) ("It is my view that, as a result of such an earnest-money receipt and agreement, there is an implied agreement between the seller and the purchaser that they will negotiate in good faith the terms of the executory real-estate contract contemplated by the agreement...In the present case, appellant refused even to attempt to negotiate the executory real-estate contract contemplated by the agreement, and thereby she breached the contract she had made...").

A recent case addresses the subject, but in our view is also not conclusive. In *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991), the plaintiffs sued the bank for damages for not renegotiating or restructuring their loan. Because there was no "express term in the loan agreement [that] required the Bank to consider [the plaintiffs'] proposal," *id.* at 569, the bank had no good faith duty to consider the proposal, because the duty of good faith "arises only in connection with terms agreed to by the parties." *Id.* Because the "loan agreement did not obligate the bank to consider the [plaintiffs'] proposal," there was no breach of the duty of good faith when the bank did not consider the proposal. *Id.* at 574. Keystone urges that this reasoning implies that if the contract did contain a promise to consider the Badgetts' proposal, the bank would have had an obligation to consider the proposal in good faith. But there is another line of analysis in *Badgett* to the contrary. The Badgetts argued that when the bank's loan officer agreed to relay the plaintiffs' proposal to the loan committee, it created a contractual duty of the bank to consider the proposal. The court held that, "the Badgetts acknowledge that their proposal was just that -- a proposal, not an agreement -- and further negotiations were necessary.

[The loan officer's] presentation to the loan committee was a step in the negotiating process ... *If* [his] promise to negotiate is *unenforceable*, it follows that it cannot give rise to a contractual duty." *Id.* (citing *Sandeman v. Sayres*, 50 Wn.2d at 541-42 (1957) (emphasis added)).

Although the older Washington precedents discourage a conclusion that there can be a contract to negotiate, our uncertainty is heightened by the modern trend in contract law. Most jurisdictions recognize the enforceability of contracts to negotiate in an appropriate case. *See Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 117 Cal.Rptr.2d 875, 882 (Cal. Ct. App. 2002) ("most jurisdictions which have considered the questions have concluded that a cause of action will lie for a breach of a contract to negotiate the terms of an agreement."). *See also Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 433 (7th Cir. 1993) (applying Illinois law); *Channel Home Ctrs. v. Grossman*, 795 F.2d 291, 298-300 (3rd Cir. 1986) (applying Pennsylvania law); *Chase v. Consol. Foods Corp.*, 744 F.2d 566 (7th Cir. 1984) (applying Illinois law); *Fickes v. Sun Expert, Inc.*, 762 F. Supp. 998, 1001 (D. Mass. 1991); *Thompson v. Liquichimica of America, Inc.*, 481 F. Supp. 365, 366 (S.D.N.Y. 1979); *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 239 (N. D. Ill. 1976); *Am. Broad. Cos. v. Wolf*, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (N. Y. 1981); *Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625, 629 (Del. 1968). *But see Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421 (8th Cir. 1991) (applying Iowa law). Many modern commentators also support this conclusion. *See* E. Allan Farnsworth, *Farnsworth on Contracts*, §3.26 at 363 (2d ed. 1998); Melvin Eisenberg, *Symposium on the Law in the Twentieth Century: The Emergence of Dynamic Contract Law*, 88 Cal. L. Rev. 1743, 1796-97 (2000); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair*

Dealing and Failed Negotiations, 87 Colum. L. Rev. 217, 273 (1987); Charles Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. Rev. 673, 728 (1969). *But see Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 276-81 (7th Cir. 1996).

Because this question of state contract law is not entirely settled in Washington, and because, if clarified definitively by the Washington State Supreme Court, the answer will have far-reaching effects on those who contract in, or are subject to, Washington law, we have concluded that an appropriate course of action for us is to certify this issue to the Washington State Supreme Court.[15]

If the Washington State Supreme Court gives an opinion that it does not recognize a contract to negotiate in this case, we will affirm the district court on that basis. Conversely, if the Washington State Supreme Court decides to recognize a contract to negotiate in this case, we will reverse the district court's order granting summary judgment to Xerox. As we will explain if it is necessary, there are genuinely disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it.[16] In this case, a trial will be necessary.

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[3] Whether to answer the certified question is within the discretion of the Washington State Supreme Court. *Broad v. Mannesmann Anlagenbau, A. G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000).

[4] Thus, the certified question is dispositive for our appeal.

ORDER

In light of our foregoing discussion, and because the answer to these questions are "necessary . . . to dispose" of this appeal, Wash. Rev. Code § 2.60.020, we respectfully certify to the Washington State Supreme Court the following questions:

(1) Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?

(2) If such a contract can exist, what is the proper measure of damages for the breach of a contract to negotiate?

We do not intend our framing of these questions to restrict the Washington State Supreme Court's consideration of any issues that it determines are relevant. If the Washington State Supreme Court decides to consider the certified questions, it may in its discretion reformulate the questions. *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075 at 1076 (9th Cir. 1999).

If the Washington State Supreme Court accepts review of the certified questions, we designate appellant Keystone as the party to file the first brief pursuant to Wash. R. App. P. 16.16(e)(1).

The Clerk of Court is hereby ordered to transmit forthwith to the Washington State Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all relevant briefs and excerpts of record pursuant to Wash. Rev. Code §§ 2.60.010, 2.60.030 and Wash R. App. P. 16.16.

Further proceedings in this court on the certified questions are stayed pending the Washington State Supreme Court's decision whether it will accept review, and if so, receipt of the answer to the certified questions. The case is withdrawn from submission, in pertinent part, until further order from this Court. The panel will resume control and jurisdiction on the certified questions upon receiving an answer to the certified questions or upon the Washington State Supreme Court's decision to decline to answer the certified questions. When the Washington State Supreme Court decides whether or not to accept the certified questions, the parties shall file a joint report informing this court of the decision. If the Washington State Supreme Court accepts the certified questions, the parties shall file a joint status report every six months after the date of the acceptance, or more frequently if circumstances warrant.

It is so **ORDERED**.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE No. 02-35847

[Filed June 7, 2004]

KEYSTONE LAND & DEVELOPMENT COMPANY,	)
Plaintiff/Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION,	)
Defendant/Counter-Claimant-Appellee.	)

APPEAL FROM ORDERS OF SUMMARY JUDGMENT FOR DEFENDANT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NO. CV-01-01018-MJP

DECLARATION OF ERIC C. FRIMODT IN SUPPORT OF MOTION FOR CLARIFICATION OF CERTIFICATION ORDER

ERIC C. FRIMODT (WSBA #21938)
INSLEE, BEST, DOEZIE & RYDER, P.S.
777-108th Avenue N.E.
Bellevue, WA 98004
Telephone No. (425) 455-1234
Facsimile No. (425) 635-7720

ERIC C. FRIMODT hereby declares as follows:

1. I am over the age of 18 years, a resident of King County, Washington, and counsel for Keystone Land & Development Company in connection with these proceedings. I have personal knowledge of, and am competent to testify to, the matters set forth herein. The facts testified to herein are, to the best of my knowledge, true and correct.

2. I have carefully reviewed the video tape of the oral arguments heard on May 11, 2004, by the Washington State Supreme Court in connection with the questions certified to it by this Court. This video tape, which was produced by the Washington Public Affairs Network, appears to accurately represent the oral arguments. A copy of the video tape of the oral arguments is submitted with this Declaration.

3. Based on this video tape, I have prepared a verbatim transcript, to the best of my abilities, of certain selected portions of the statements and questions made by the justices of the Washington State Supreme Court. This transcript is presented in the following paragraphs of this Declaration.

4. The following represents a question posed by Chief Justice Gerry L. Alexander to me immediately after the commencement of oral arguments:

> You left out part of what you have. You have the certified questions in your brief. Number 1 says, "Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract." That's what you just read. But, it goes on to say, "under the circumstances of this case." Isn't that...Isn't that the federal judges' job to decide whether, what...what...how to apply the law under the circumstances of this case? Why was that in there?

5. The following represents a statement made by Chief Justice Gerry L. Alexander to Larry Smith, Xerox's counsel, regarding his concerns relating to the nature of the certified questions:

> If we answer this first question "no", what happens in the Ninth Circuit? That's the end of the case, isn't it? So we've decided the Ninth Circuit's case for them. I mean this part of the case. Maybe I'm the only one that is bothered by this. I would feel a lot better about this question if it was presented in a more generic way, rather than asking us to decide whether, does Washington contract law recognize and enforce an agreement between two or more parties to negotiate a future contract under the circumstances, and then they describe the circumstances, rather than say "under the circumstances of this case." We're supposed to look at the Ninth Circuit record and say, "you're out of court or you're in court"?

6. The following questions were raised by Justice Faith Ireland relating to the significance of the parties being "prepared to negotiate" a Purchase and Sale Agreement:

> Are you talking about the April 10th letter? Because on that letter you say, "Xerox is prepared to negotiate a purchase and sale agreement." I guess I don't know what "prepared" means exactly in that context. Is it kind of like "fixing" in the south?

7. Justice Barbara Madsen expressed the following concerns about how long Keystone and Xerox were required to continue negotiating:

> Counsel, what about the point your opposing counsel makes about the nebulous nature of this requirement that we would impose for negotiating. When he points out the possibility of building that into your agreement, that is for 90 days we will exclusively negotiate with your company, which puts a finite limit on it. In your first remarks you said your belief was that the obligation here is to negotiate all the way through to a deal. Is that what you are advocating? Or would it be, as counsel suggests, that you know there is a finite period of time during which we would want to imply that negotiations had to take place, or else we would be saying you have to come out with a deal at the end regardless?

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 4th day of June, 2004, at Bellevue, Washington.

/s/ _____
ERIC C. FRIMODT

(2)

Supreme Court, U.S.
FILED

04-911 DEC 2 - 2004

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

KEYSTONE LAND & DEVELOPMENT COMPANY,
Petitioner,

v.

XEROX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

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Appendix H - District Court's Order Dated July 12, 2002, Granting Partial Summary Judgment for Defendant on Issue of Lis Pendens Liability 53a

Appendix I - District Court's Order Modifying Judgment Dated November 20, 2002 . . . . . 58a

Appendix J - District Court's Judgment Dated November 25, 2002 . . . . . 60a

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C01-1018

[Filed, March 14, 2002]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff,	)
v.	)
XEROX CORPORATION, Defendant.	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER came before the Court on two related motions. Plaintiff filed a motion for partial summary judgment on the grounds that Plaintiff and Defendant entered into a binding contract and Defendant breached the contract and the implied covenant of good faith and fair dealing. Dkt No. 42. Defendant filed a motion for summary judgment on the

grounds that Plaintiff's breach of contract claim fails due to the contingent nature of the agreements, statute of frauds violations, and a lack of consideration. Dkt No. 44. Both parties argued their motions before this court on March 8, 2002. After considering the papers and pleadings filed herein, and having heard oral argument, Defendant's motion is GRANTED and Plaintiffs motion is DENIED for the reasons stated below.

Background

In early 2001, Defendant decided to sell its Tukwila, Washington commercial building (the "Xerox Building") and lease it back from the new owner. Defendant hired Jones Lang LaSalle ("JLL") as its broker and JLL associated Kidder Mathews Segner ("Kidder"), a local brokerage firm. Kidder put out a call for offers in February, 2001.

On March 8, 2001, Plaintiff submitted an Offer to Purchase the Xerox Building to Kidder. The offer letter stated that it "shall be incorporated into a binding Purchase and Sale Agreement upon execution by both parties." On April 4, 2001, Kidder requested that Plaintiff submit a final and best offer and informed Plaintiff of its offer's "critical issues" (i.e. non-competitive terms). On April 6, 2001, Plaintiff submitted an amendment to its Offer to Purchase. The amendment letter concluded with the statement that Plaintiff was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement for the property."

On April 10, 2001, Kidder forwarded a letter to Plaintiff which stated: "Xerox is prepared to negotiate a Purchase and Sale Agreement with Keystone Development subject to two modifications to your Proposal." The letter ended with the following statements: "If these modifications are acceptable

to you, please have Keystone Development acknowledge their agreement below. We can then proceed immediately to draft the Purchase and Sale Agreement for review and execution." This letter was signed by Kidder employees, not by Defendant. On April 13, 2001, Plaintiff's president signed the April 10th Kidder letter, in effect acknowledging its acceptance of the modifications.

Defendant began its due diligence and sought counsel to negotiate a Purchase and Sale Agreement after it received the signed letter from Plaintiff. Kidder requested assurances from Plaintiff's prospective lender that financing would be available and Plaintiff sent a letter stating it had a strong financial background and could close the deal. Kidder also contacted an officer from Key Bank, who was familiar with the proposed sale. Plaintiff asserts that Kidder did not begin inquiring into Plaintiff's financing until after receiving a higher offer from the City of Tukwila.

In early May, Plaintiff contacted Kidder to inquire about the status of the Purchase and Sale Agreement, which Plaintiff believed Kidder was preparing. On May 11, Defendant's legal counsel informed Plaintiff that it would not sell the building to Plaintiff and that it intended to accept another offer. Subsequently, Plaintiff filed this breach of contract suit in King County Superior Court and Defendant removed it to federal court on the basis of diversity jurisdiction.

Analysis

I. Contract Formation

The basic question here is whether the letters exchanged between Plaintiff and Defendant established a contract. The burden of proving a contract, whether express or implied, is

on the party asserting it, and this party must prove each essential fact, including the existence of a mutual intention. Cahn v. Foster & Marshall, Inc., 33 Wn. App. 838, 840 (1983).

In order to form a contract, the parties must manifest to each other their mutual assent to the same bargain at the same time. Pacific Cascade Corp. v. Nimmer, 25 Wn. App. 552, 555-56 (1980). The element of mutual assent is satisfied by a promise to render a stated performance in exchange for a return promise being given. Id. at 556. However, the intention to do a thing is not a promise to do it and an agreement to negotiate a contract in the future is nothing more than negotiations. Id.

A. Intention to Execute a Formal Agreement

The fact that parties intend to execute a subsequent agreement is strong evidence that they do not intend the previous negotiations to amount to a proposal or acceptance. Pacific Cascade, 25 Wn. App. at 556. "If from a promise, or manifestation of intention, or from circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer." Id. at 557.

The intention to execute a subsequent agreement, however, does not bar the finding that a contract exists. Loewi v. Long, 76 Wash. 480, 484 (1913). If the subject matter is not disputed, the terms are agreed upon, and the parties' intentions are plain, then a contract exists by virtue of the informal writings even though they may contemplate that a more formal contract shall be subsequently executed. Id. at

484. The writings must specify all the material and essential terms of the contract and leave none to be agreed upon during further negotiations. Hubbell v. Ward, 40 Wn.2d 779, 785 (1952).

To determine whether informal writings are sufficient to establish a contract despite the parties' intention to sign a more formal written agreement, Washington courts consider whether (1) the subject matter has been agreed upon; (2) the terms are all stated in the informal writings; and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. Morris v. Maks, 69 Wn. App. 865, 869 (1993).

In this case, the critical question is whether the parties intended a binding agreement prior to the execution of a formal Purchase and Sale Agreement. Washington courts use the objective manifestation theory in construing the words and acts of alleged contractual parties. Morris, 69 Wn. App. at 871. Through application of this theory, the court imputes to a person an intention which corresponds to the reasonable meaning of his or her words and acts. Id. Intentions which are not expressed are ineffectual. Id.

Defendant states that the Plaintiff's Offer to Purchase reveals Plaintiff's understanding that a binding legal obligation would not begin until execution of a Purchase and Sale Agreement. In this letter, Plaintiff wrote that the terms of the offer "shall be incorporated into a binding Purchase and Sale Agreement upon execution by both parties." Further, Plaintiff stated that the Offer to Purchase was "specifically subject to" Plaintiff's review and written approval of the ground lease, parking lease, an engineering study, mutual agreement with respect to all terms and conditions of the lease agreement, satisfactory review of all information related to

asbestos, an environmental assessment, and "execution of a Purchase and Sale Agreement with (sic) thirty (30) days from execution of this letter of intent." Plaintiff concluded the letter by stating that it looked forward to the possibility of completing a Purchase and Sale Agreement and entering into a long-term relationship with Defendant.

Plaintiff's amendment letter also anticipates the future completion of a Purchase and Sale Agreement. This letter concludes with the statement that Plaintiff "is prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement for the property."

The counter-offer letter, Defendant's letter that requested modifications to Plaintiff's amended offer, stated that Defendant was prepared "to negotiate a Purchase and Sale Agreement with Keystone" subject to two modifications. The letter asked Plaintiff to accept the modifications and indicated that Defendant would draft the Purchase and Sale Agreement for review and execution after acceptance. Plaintiff signed this letter without adding any language about the binding or non-binding nature of it.

In looking at the language of these letters, it is evident that the parties did not intend the letters to be binding. All of the letters clearly contemplated a future Purchase and Sale Agreement. Defendant stated that it anticipated further negotiation. Plaintiff used the term "binding" when it described the forthcoming Purchase and Sale Agreement, which indicates that it believed that acceptance of the Offer to Purchase would not be binding. Further, Plaintiff stated that the Offer to Purchase was specifically subject to execution of a Purchase and Sale Agreement within thirty days from execution of "this letter of intent." The statement that the offer was subject to its review of the Purchase and Sale

Agreement further evidences Plaintiff's intent that its offer would not be binding.

B. Statute of Frauds

The statute of frauds requires that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate shall be by deed." RCW 64.04.010. It also requires that every deed be in writing, signed by the party to be bound, and acknowledged by the party before an authorized person to take acknowledgment of deeds. RCW 64.04.020. Failure to comply with the statute of frauds renders an agreement unenforceable.

In addition to intent issues, Defendant states that the exchanged letters do not form an enforceable contract because they fail to comply with the statute of frauds. Defendant asserts that the statute of frauds issues include the lack of a legal description of the property, the lack of a promise to sell the building, and the failure of Defendant to sign the letters.

i. Defendant's Ability to Use the Statute of Frauds Defense

Before reaching Defendant's statute of frauds arguments, Plaintiff's argument that Defendant is unable to use the statute of frauds defense must be addressed. Plaintiff has raised the following two arguments against Defendant's ability to use the statute of frauds defense.

First, Plaintiff asserts that Defendant waived the statue of frauds defense by failing to raise it in its motion to dismiss or in its first answer. Plaintiff filed a second amended complaint pursuant to a stipulation and agreed order amending the

complaint. Five days later, Defendant filed an amended answer that included the statute of frauds defense. Rule 8(c) of the Federal Rules of Civil Procedure states that a party shall set forth affirmatively a statute of frauds defense "in a pleading to a preceding pleading." In addition, Rule 15(a) requires that a "party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders." Fed. R. Civ. P. 15(a).

Based upon the language of the Federal Rules, Defendant is not barred from amending its answer. The Rules do not bar parties from amending their responsive pleadings merely because the pleading was amended pursuant to a stipulation of the parties. Further, the stipulation and agreed order clearly does not bar Defendant from filing an amended answer since it declares that "Xerox is not required to file an answer to the amended complaint." Thus, Plaintiff's argument that Defendant waived its right to amend its answer fails.

Second, Plaintiff asserts that Defendant is estopped from using the statute of frauds defense because Xerox breached its promise to draft a Purchase and Sale Agreement, a document which would have satisfied the statute of frauds. To support this theory, Plaintiff uses a case in which a franchisor breached its promise to a franchisee to execute a franchise agreement. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255,260 (1980). The franchisee was allowed to bring an action for breach of oral contract, despite the unsatisfied statute of frauds requirements, based on the theory of promissory estoppel. Id. However, in Klinke, there was no question of the parties' intent to form a contract; both franchisor and franchisee manifested their intent to form a franchise agreement and franchisee clearly relied on this

promise when he sold his business, moved to Washington, and searched for an appropriate location for the restaurant. Klinke is inapplicable to this case because neither Plaintiff nor Defendant manifested their intent to form a contract nor made a promise to buy or sell. See Section A, above.

ii. The Elements of the Statute of Frauds Defense

a. Legal Description

A contract to transfer an interest in real property must contain a description of the land sufficiently definite to locate it without reliance on oral testimony or a reference to another instrument that contains a sufficient description. Bigelow v. Mood, 56 Wn.2d 340, 341 (1960). Agreements that do not contain an adequate legal description of the property are void. Berg v. Ting, 68 Wn. App. 721,727 (1993).

The legal description must contain a description of the property by correct lot number, block number, addition, city, county, and state. Key Design, Inc. v. Moser, 138 Wn.2d 875, 881 (1999).

The most frequent cause of an inadequate description is the use of a street address, which is not sufficient in Washington. William B. Stoebuck, 18 Wash. Prac., Real Estate: Transactions § 12.3.5 (2001). In Key Design, the Washington Supreme Court reaffirmed the proper legal description requirement and held that a property description using the business name, street address, city, county, and state did not meet the requirement. 138 Wn.2d at 881.

Here, Plaintiff's Offer to Purchase did not include a proper legal description of the property. The description included the building's common name, street address, city,

state, and square footage; it did not include the lot number, block number, or county. Plaintiff even acknowledged in its Offer to Purchase that the above description was not a proper legal description by stating that the legal description "shall be provided by [Xerox] and shall be subject to review and approval by [Keystone]." In addition, the other letters involved also did not contain a proper legal description of the building. Therefore, the letters fail to meet the statute of frauds requirement of a proper legal description.

Plaintiff argues that the Xerox building is located on unplatted real estate, and therefore the requirement of a proper legal description does not apply. Further, Plaintiff claims that the Bigelow test is met because (1) the description is sufficient to locate the property without resort to oral testimony; (2) the offer letter refers to the "Ground Lease," which contains a full legal description of the property; and (3) the parties contemplated incorporation of the legal description once Xerox delivered it to Keystone.

Even if the property is unplatted, the description is not sufficient under the rule set forth in Key Design. In comparison to the parties in Key Design, Plaintiff included even less information in its description of the property and easily could have included the block number and county. Further, "contracts for the sale of unplatted as well as platted land must contain the legal description." William B. Stoebuck, 18 Wash. Prac., Real Estate: Transactions § 15.3 (1995).

Plaintiff's claim that the Offer to Purchase refers to the Ground Lease is a bit misleading. Plaintiff did not mention the Ground Lease in conjunction with the description of the property and never stated that the Ground Lease should be consulted for the proper legal description. In fact, based upon

the offer letter's language, Plaintiff had not seen the Ground Lease before submitting its Offer to Purchase and stated that the offer was contingent upon review and approval of the Ground Lease. Thus, the Offer to Purchase did not refer to a document that contained a sufficient description of the property.

A legal description may be valid if the contract authorizes an agent for the vendor to later fill in the legal description and the agent does so. Edwards v. Meader, 34 Wn.2d 921,925 (1949). In Edwards, the agreement in question was an earnest money agreement that was signed by both parties and the legal description was phrased: "1136 Vandalia Legal Des. to be entered by agent." Id. at 923. The agent entered the legal description one to two days later. Id. Here, the legal description still had to be approved by Plaintiff. Plaintiff certainly did not give Defendant or Kidder the authority to automatically enter the legal description. Thus, this argument fails as well

b. Promise to Sell

In order to satisfy the statute of frauds, a writing must reveal the intent by the signing party to be presently bound. Hunt v. Great Western Sav. Bank., 54 Wn. App. 571,574 (1989). Defendant correctly asserts that the letters involved in this case do not contain a promise by Defendant to sell or by Plaintiff to buy the Xerox Building.

c. Signature

The statute of frauds requires that every deed be in writing and signed by the party to be bound. RCW 64.04.020. The letters in question were signed by Kidder, not Defendant, and thus Defendant claims that the statute of frauds signature

requirement has not been met. Defendant further asserts that Kidder did not have the power to bind Defendant.

When a corporation wishes to sell an interest in real property, the agreement must be signed by an officer or member with signing authority. Brokers generally do not have the power to enter into a contract binding the principal to convey land. Lee v. Estabrook, 28 Wn.2d 102, 108 (1947).

> "Unless the listing agreement specifically gives him additional powers, a broker has no power to execute a contract for his principal or to make a binding agreement as to the terms of sale. This has been long and well established in Washington. Authority to make a binding agreement must be clearly granted, for it has been held that general words such as an instruction to 'sell' or to 'go ahead and make the deal' do not grant such authority."

William B. Stoebuck, 18 Wash. Prac., Real Estate: Transactions § 14.7 (2001). However, an agent who has authority to sell real estate may bind his principal with respect to the rights of third parties without violating the statute of frauds. Rekhi v. Olason, 28 Wn. App. 751,755 (1981).

The listing agreement does not give JLL or Kidder the authority to bind Defendant in the sale of its Tukwila building. It states that Defendant engaged JLL for the "sole purpose of procuring a buyer for the premises." The First Amendment to the listing agreement, which acknowledges Defendant's consent to JLL's sub-agency agreement with Kidder, reiterates that Defendant engaged JLL as its exclusive real estate broker for the "sole purpose of procuring a buyer for the premises." The agreement outlines JLL's duties, commission terms, and indemnities. It also states that all

proposed sale arrangements shall be delivered to Jack Bradford of Xerox. There is no clause giving JLL or Kidder the power to bind Defendant in a sales agreement.

II. Duty of Good Faith and Fair Dealing

Plaintiff states in its motion that Defendant breached the implied covenant of good faith and fair dealing when it failed to negotiate a Purchase and Sale Agreement with Plaintiff. Plaintiff correctly states that the covenant is implied in every contract. However, under Washington law, whether Defendant breached this covenant depends on whether there was a binding contract. The implied covenant applies only to the performance of specific contract obligations. Badgett v. Security State Bank, 116 Wn.2d 563, 570 (1991). "If there is no contractual duty, there is nothing that must be performed in good faith." Johnson v. Yousoofian, 84 Wn. App. 755, 762 (1996). Thus, whether the implied covenant of good faith and fair dealing applies hinges on the existence of a contract. As explained in Section A, above, the parties did not form a valid contract, and therefore the implied covenant of good faith and fair dealing does not apply.

Conclusion

Defendant's motion for summary judgement is GRANTED and Plaintiff's motion for partial summary judgment is DENIED. The clerk is directed to send copies of this order to all counsel of record.

Dated this 14 day of March, 2002.

/s/_____

Marsha J. Pechman
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C01-1018P

[Filed, July 12, 2002]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff,	)
v.	)
XEROX CORPORATION, Defendant.	)

ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR DEFENDANT ON ISSUE OF LIS PENDENS LIABILITY

This matter comes before the Court on cross-motions brought by the parties. Defendant has brought a motion for partial summary judgment, seeking a determination of plaintiff's liability as a matter of law for the filing of a lis pendens against real property owned by defendant. Dkt. No. 81. Plaintiff has brought a cross-motion for summary judgment, seeking exemption from liability on the same issue.

Dkt. No. 78. Having considered the pleadings filed by the parties, and having reviewed the record, the Court ORDERS as follows:

- Defendant's motion for partial summary judgment (Dkt. No. 81) is GRANTED.

- The Court will award costs and attorneys' fees to defendant pursuant to RCW 4.28.328(3). At the conclusion of this litigation, defendant may submit an accounting of costs and fees. Before the Court orders payment in any specific amount, plaintiff will be given an opportunity to challenge the reasonableness of the proposed costs and fees.

- Plaintiff's motion for summary judgment (Dkt. No. 78) is DENIED.

FACTS

This case involves negotiations between the parties for the sale of a building. Keystone had contemplated purchasing a building from Xerox. The sale fell through before a purchase and sale agreement could be finalized. Keystone sued Xerox for breach of contract, seeking damages or, in the alternative, specific performance. By prior Order, the Court ruled that there was no enforceable contract between the parties. Dkt. No. 69. Summary judgment was accordingly granted for defendant. Id.

The pending motions involve litigation over Xerox's sole counterclaim. For a period of time while this litigation was pending, Keystone had filed a lis pendens against the subject building. As a result, Xerox claims that it was unable to "pursue and accept a better offer from another party."

Answer to Second Amended Complaint and Counterclaim, p.5 ¶4. Although the lis pendens has since been voluntarily lifted by Keystone, Xerox seeks damages arising from the alleged interference with its sale of the building. In addition, Xerox seeks discretionary costs and attorneys' fees.

ANALYSIS

Because defendant has prevailed in the underlying action, defendant is entitled to seek actual damages caused by the filing of the lis pendens. RCW 4.28.328(3). The Court may also, in its discretion, award attorneys' fees to defendant. Id. Plaintiff is not liable for damages and fees if plaintiff "establishes a substantial justification for filing the lis pendens." Id.

The facts surrounding the imposition, and subsequent voluntary withdrawal, of the lis pendens are not in dispute. Thus, the only issue before the Court is whether plaintiff had "substantial justification" for the filing of the lis pendens. The Court concludes that plaintiff did not.

The Court has very little guidance in interpreting the meaning of "substantial justification." In fact, the Court is aware of only one published opinion which defines this crucial term.[1] See Richau v. Rayner, 98 Wn.App. 190 (Div. III 1999). In Richau, the appellate court upheld a trial court

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[1] Both parties have relied on additional cases which are far afield from the matter before the Court. Plaintiff cites to cases involving actions for slander to title. See Dkt. No. 82. Defendant cites to cases which define the "substantial justification" standard in unrelated contexts, such as the Federal and Washington Equal Access to Justice Acts. See Dkt. No. 81. The Court does not find any of this authority to be persuasive.

finding of no substantial justification in a case involving the filing of a lis pendens. Id. at 198. In reaching this conclusion, the appellate court noted that the record supported a finding that the parties who had filed the lis pendens were aware that they did not have any legal right to the property claimed. Id.

While the facts in Richau are not directly in line with the facts before the Court, the Richau holding is instructive. Lis pendens liability attaches if plaintiff knew (or should reasonably have known), at the time the lis pendens was filed, that it had no legal entitlement to defendant's property. The Court must examine the substance of plaintiff's claims in order to answer this question.

The Court concedes that the issue of contract formation is a difficult one. Plaintiff could have arguably believed that a contract was formed between the parties, and that specific performance was therefore an available remedy. If this litigation had rested on the question of contract formation alone, the Court might conclude that the filing of the lis pendens was substantially justified.

The filing of the lis pendens was not substantially justified, however, because plaintiff should have known from the outset that the alleged agreement to sell defendant's building was in violation of the statute of frauds. Plaintiff's Offer to Purchase defendant's building did not include a proper legal description of the property. In addition, neither party provided a written promise to buy or sell. Finally, neither defendant nor any agent authorized to bind defendant

signed any document agreeing to the sale of the building.[2] These violations of the statute of frauds were significant and should have been obvious to plaintiff. For that reason, the Court cannot conclude that plaintiff was substantially justified in filing a lis pendens against the subject property.

CONCLUSION

Plaintiff did not have substantial justification for filing a lis pendens against defendant's property. For that reason, partial summary judgment is GRANTED for defendant on its sole counterclaim. This ruling goes to the issue of liability only; defendant must still establish damages pursuant to RCW 4.28.328(3). Plaintiff's cross-motion for summary judgment is DENIED. Reasonable attorneys' fees and costs are awarded to defendant pursuant to RCW 4.28.328(3). Defendant shall submit an accounting of costs and fees at the conclusion of this litigation. After providing plaintiff an opportunity to be heard on the reasonableness of the costs and fees, the Court will order payment of a specific amount.

The Clerk of the Court is directed to distribute a copy of this Order to all counsel of record.

Dated this 12 day of July, 2002.

/s/
Marsha J. Pechman
United States District Judge

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[2] These issues were more fully analyzed by the Court in its prior Order granting summary judgment to defendant. See Dtk. No. 69.

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C01-1018P

[Filed, November 21, 2002]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff,	)
v.	)
XEROX CORPORATION, Defendant.	)

ORDER MODIFYING JUDGMENT

This matter comes before the Court on plaintiff's motion to modify this Court's September 5, 2002, judgment to encompass this Court's July 12, 2002 order granting partial summary judgment for defendant on the issue of lis pendens liability. Having considered the pleadings and papers submitted by the plaintiff, and there being no opposition to the motion, the Court hereby GRANTS the motion. The judgment is hereby modified to allow Keystone to appeal the order granting partial summary judgment on lis pendens liability. A

judgment reflecting this modification will be issued concurrently with this order.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: November 20, 2002.

/s/ _____
Marsha J. Pechman
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C01-1018P

[Filed, November 25, 2002]

KEYSTONE LAND & DEVELOPMENT COMPANY,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

JUDGMENT IN A CIVIL CASE

____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Pursuant to Fed. R. Civ. P. 54(b), there being no reason for further delay,

the Court grants partial summary judgment for defendant on defendant's counterclaim and certifies this order as final so that it may be reviewed on appeal.

Dated: November 25, 2002

BRUCE RIFKIN, Clerk of Court

/s/_____
By, Deputy Clerk

(3)

No. 04-911

In the Supreme Court of the United States

KEYSTONE LAND & DEVELOPMENT COMPANY,
Petitioner,

v.

XEROX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

In a diversity case decided by the district court on cross-motions for summary judgment, does a federal appellate court, which is reviewing the summary judgment de novo, unconstitutionally or in violation of federal statute abdicate its jurisdictional power by articulating the undisputed facts and certifying to the state supreme court the question whether state law recognizes a contract claim under those circumstances?

May a party who objects to the scope of a certification order on the ground that it unconstitutionally or in violation of federal statute abdicates the federal court's diversity jurisdiction delay asserting that objection until after decisions on the merits by the state supreme court and the federal appellate court, without thereby waiving the objection?

PARTIES TO THE PROCEEDING AND XEROX'S CORPORATE DISCLOSURE STATEMENT

Petitioner is Keystone Land & Development Company ("Keystone"), the plaintiff below.

Respondent is Xerox Corporation ("Xerox"), the defendant below. Xerox does not have a parent corporation. As of December 31, 2003, the following two entities owned 10% or more of Xerox Corporation's stock:

1) Dodge & Cox

2) State Street Bank and Trust Company.

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OPINIONS AND ORDERS BELOW

The following opinions and orders relevant to the questions presented for review were entered in the case:

March 14, 2002: Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment, U.S. Dist. Ct., W.D. Wash. at Seattle, No. C01-1018 ("Summary Judgment Order" – Petitioner's Appendix G);

December 31, 2003: *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1070 (9th Cir. 2003), Opinion affirming District Court Summary Judgment Order as to breach of alleged contract to sell ("Keystone I" – Respondent's Appendix 1);

December 31, 2003: *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1093 (9th Cir. 2003), Order certifying contract to negotiate issue to Washington State Supreme Court ("Certification Order" – Petitioner's Appendix E);

June 17, 2004: Order Granting in Part and Denying in Part Keystone's Motion for Clarification of Certification Order, U.S. Ct. of App. for the 9th Cir., No. 02-35847 ("Clarification Order" – Petitioner's Appendix D);

July 22, 2004: *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004), *En Banc* Opinion by Washington State Supreme Court on certification ("State Supreme Court Opinion" – Petitioner's Appendix C);

August 4, 2004: *Keystone Land & Dev. Co. v. Xerox Corp.*, 378 F.3d 949 (9th Cir. 2004), Opinion affirming District Court Summary Judgment Order as to breach of alleged contract to negotiate ("Keystone II" – Petitioner's Appendix B);

September 7, 2004: Order Denying Petition for Rehearing, U.S. Ct. of App. for the 9th Cir., No. 02-35847 ("Rehearing Denial" – Petitioner's Appendix A).

STATEMENT OF THE CASE

This is a state-law breach of contract case in which Keystone claims that Xerox breached two contracts – an alleged contract to sell real property to Keystone, and an alleged contract to negotiate and draft a Purchase and Sale Agreement to effectuate the transaction. The Petition involves only the latter – the alleged contract to negotiate. After fully litigating – in the District Court, the Ninth Circuit, and the Washington State Supreme Court – the summary judgment dismissal of Keystone's negotiation claim on the merits, Keystone now seeks certiorari by this Court in an effort to overturn the dismissal on procedural grounds.

Keystone filed this breach of contract action in King County Superior Court in and for the State of Washington. Summary Judgment Order, Pet. App. G at 42a. Xerox removed the case to federal court based on diversity jurisdiction. *Id.*

Keystone and Xerox filed cross-motions for summary judgment. *Id.* at 40a-41a. Keystone sought to enforce the alleged contracts to sell and negotiate; Xerox sought to dismiss them. *Id.* Both parties agreed that the claims were

ripe for summary judgment. Plaintiff's Response to Xerox's Motion for Summary Judgment (dkt. no. 59) at 2.

After considering the voluminous materials submitted by the parties in support of and opposition to the respective motions,[1] the District Court granted Xerox's motion and denied Keystone's. Summary Judgment Order, Pet. App. G at 41a. The District Court ruled that the parties had not formed a contract to buy and sell the real property because their correspondence manifested a mutual intent that no binding legal obligations would be created until they had executed a Purchase and Sale Agreement. *Id.* at 43a-46a. Keystone had argued that even if the correspondence between the parties did not constitute a binding agreement to buy and sell the property, it contained an express covenant by Xerox "to negotiate a Purchase and Sale Agreement with Keystone," and by failing to do so, Xerox had "violated the implied covenant of good faith and fair dealing." Plaintiff's Motion for Partial Summary Judgment (dkt. no. 42) at 21. Keystone relied on Washington law and on cases from other jurisdictions enforcing preliminary contracts to negotiate. *Id.* at 21-27. But the District Court ruled that, under Washington law, the lack of a binding contract between the parties negated any duty to negotiate any further. Summary Judgment Order, Pet. App. G at 52a.

Keystone appealed to the Ninth Circuit, seeking *de novo* review. *See* Appellant's Opening Brief (9th Cir.) at 1. In its Statement of Facts, Keystone clearly informed the Ninth Circuit what documents it alleged constituted the contract

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[1] These summary judgment materials were about four inches thick. *See* District Court record (dkt. nos. 27-32, 42, 44-47, 57-65); Ninth Circuit record (ER 1-132, Supp. ER 1-82).

between Xerox and Keystone: "The aforesaid letters dated March 8, 2001, April 4, 2001, April 6, 2001, and April 10, 2001 constitute the documents forming the contract between the parties." *Id.* at 6; *see also* Appellant's Excerpts of Record (9th Cir.) (in Table of Contents, Keystone marked "the documents forming the contract between the parties" with asterisks). Keystone asserted that these letters and the other evidence presented on summary judgment established Xerox's liability on both the alleged contract to sell and the alleged contract to negotiate, as a matter of law. Appellant's Opening Brief (9th Cir.) at 58.

The Ninth Circuit disagreed. The Ninth Circuit affirmed summary judgment dismissing Keystone's claim for breach of an alleged contract to sell the building. Keystone I, Resp. App. 1 at 2b. The Ninth Circuit held that, viewing the letters' language and surrounding circumstances in the light most favorable to Keystone, no rational fact-finder could find that the parties intended their correspondence to form a present contract of sale; rather, the letters showed only a future contractual intent. *Id.* at 5b-9b.

The Ninth Circuit also disagreed with Keystone that, as a matter of law, the parties' correspondence manifested a mutual intent to enter into a contract to negotiate. Certification Order, Pet. App. E at 32a. The court held that ***if*** Washington law would recognize and enforce the alleged contract to negotiate in this case, then genuinely disputed material facts would permit, though not compel, a rational jury to conclude that a contract to negotiate had been formed and breached. *Id.* That is, if the documents composing the alleged contract were legally sufficient under Washington law to create an enforceable contract to negotiate, then factual questions as to whether the parties had actually formed a contract to negotiate, and whether Xerox breached it, would

require a trial. *Id.* Because the Ninth Circuit believed that Washington law was not entirely settled on the dispositive legal issue – whether, and under what circumstances, Washington contract law would recognize and enforce an agreement to negotiate a future contract – and because resolution of the issue would have far-reaching effects on those who contract subject to Washington law, the Ninth Circuit certified the question to the Washington State Supreme Court. *Id.* at 32a-33a.

The Ninth Circuit discharged its obligation to review the District Court's Summary Judgment Order *de novo*. In its Opinion (Keystone I), the Ninth Circuit recounted the undisputed facts in the record that led to its conclusion that the parties had not entered into a contract to buy and sell real property. Keystone I, Resp. App. 1 at 2b-9b. In its Certification Order, the Ninth Circuit reiterated those facts. Certification Order, Pet. App. E at 25a – 27a. The court thoroughly explained its perception of the relevant Washington cases, summarized cases from other jurisdictions that have recognized and enforced preliminary contracts to negotiate, and carefully articulated the questions of state contract law certified to the Washington State Supreme Court. *Id.* at 28a-32a.

Neither party objected to the Ninth Circuit's Certification Order. On the contrary, both Keystone and Xerox adopted the Ninth Circuit's factual summary in their briefs to the Washington State Supreme Court. Keystone Certified Question Brief, Resp. App. 2 at 21b; Xerox Certified Question Brief, Resp. App. 3 at 59b.[2] Keystone attached for

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[2] Because the parties' Certified Question Briefs are not part of the Ninth Circuit record, Xerox is attaching excerpts of them as

the Washington State Supreme Court's convenience "a copy of the letters which form the written contract between Xerox and Keystone." Keystone Certified Question Brief, Resp. App. 2 at 22b. And Keystone devoted seventeen pages of its 45-page argument to a section titled, "Application of Law Relating to Agreements to Negotiate to Specific Facts of Keystone v. Xerox." *Id.* at 15b-16b, 35b-50b.

The Washington State Supreme Court heard oral argument on the certified questions on May 11, 2004. Frimodt Dec. Supporting Motion for Clarification of Certification Order, Pet. App. F at 36a. At the outset of his argument, Keystone's counsel read the certified question to the court, but he omitted the clause that requested the Washington State Supreme Court to rule on the enforceability of a contract to negotiate "under the circumstances presented in this case." *See id.* at 37a. Chief Justice Gerry L. Alexander quizzed him on the omission and asked why the Ninth Circuit had included that clause. *Id.* Justice Alexander also expressed concern about the Ninth Circuit's presentation of the certified question; he would have preferred a more generic question that described the relevant circumstances rather than using the phrase "under the circumstances of this case." *Id.* And he was "bothered" by the concept that the Washington Supreme Court's resolution of the certified question might completely decide the case. *Id.* Questioning by other panel members, however, reflected concerns about the merits of Keystone's claim and the vagueness of the alleged contract to negotiate in this case. *See, e.g., id.* at 38a.[3]

Appendices 2 and 3 hereto.

[3] Keystone submitted to the Ninth Circuit a videotape of the oral argument. *Id.* at 36a.

Based primarily on Justice Alexander's comment, Keystone sought clarification from the Ninth Circuit as to the intended scope of its Certification Order. Keystone's Motion for Clarification of Certification Order (9th Cir.) at 1. Keystone asked whether the Ninth Circuit really wanted guidance based on "the specific facts relating to the dispute between Keystone and Xerox," and tried to convince the court to make its question more general. *Id.* at 1, 3-6. But Keystone did not raise any constitutional, statutory or other legal objection to the certified question as framed. *Id.* at 1-7.

The Ninth Circuit responded with an Order Granting in Part and Denying in Part Keystone's Motion for Clarification of Certification Order. Clarification Order, Pet. App. D at 20a-23a. In the Clarification Order, the Ninth Circuit reaffirmed that it had intentionally requested guidance on Washington law "as applied to this case." *Id.* at 22a.

Keystone then requested the Washington State Supreme Court to accept additional briefing on the question whether that court should limit its decision to the general enforceability of agreements to negotiate, instead of the more case-specific guidance that the Ninth Circuit had requested. Keystone's Motion for Permission to Submit Supplemental Briefs, Resp. App. 4 at 74b-80b.[4] But Keystone still did not raise any constitutional, statutory, or other legal bar to the case-specific question certified by the Ninth Circuit. *Id.* Nor did Keystone raise any such issue in its reply brief on the motion. Reply to

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[4] Because the Motion for Permission to Submit Supplemental Briefs, and the Response and Reply thereto, are not part of the Ninth Circuit record, Xerox is attaching them as Appendix 4 hereto.

Xerox's Response to Keystone's Motion for Permission to Submit Supplemental Briefs, Resp. App. 4 at 89b-97b.

The Washington State Supreme Court chose to answer the certified question as framed by the Ninth Circuit. State Supreme Court Opinion, Pet. App. C at 10a-11a.[5] The court held that Washington law would not recognize and enforce an agreement, either implicit or explicit, to negotiate a future contract under the circumstances presented in this case. *Id.* Specifically, the court held that the correspondence that Keystone claimed constituted the contract to negotiate did not satisfy Washington's traditional requirements for an enforceable contract. *Id.* at 15a-18a. There was no objective manifestation of mutual assent to definite contract terms supported by consideration; accordingly, no contract was formed. *Id.* at 17a. Further, the court refused to imply a duty to go forward based on progress made in substantive negotiations between the parties. *Id.* at 18a. The court discussed the general parameters of preliminary contracts to negotiate as enforced in other jurisdictions, and held that no such contract had been formed in this case. *Id.* at 12a-18a. Because the documents that constituted the alleged contract between Keystone and Xerox were legally insufficient to form a contract to negotiate, the court did not decide whether preliminary contracts to negotiate would ever be enforceable under Washington contract law. *Id.* at 19a. The Washington State Supreme Court issued its decision *en banc*, without any discussion or expression of concern about the scope of the certified question. *Id.* at 9a-11a.

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[5] In a footnote, the court denied Keystone's request to submit supplemental briefing. *Id.* at 10a, n.1.

The Ninth Circuit then issued Keystone II, which acknowledged that the Washington State Supreme Court "has resolved the dispositive question that we certified to it." Keystone II, Pet. App. B at 3a. The Ninth Circuit did not simply rubber-stamp the State Supreme Court Opinion. Based on Washington law as explained by the Washington State Supreme Court, the Ninth Circuit independently held that "Keystone's evidence does not suffice to establish a contract to negotiate." *Id.* at 7a. Accordingly, the Ninth Circuit affirmed the District Court's order granting summary judgment for Xerox on the alleged contract to negotiate. *Id.* at 7a-8a.

After losing on the merits, Keystone finally, in a Petition for Panel Rehearing filed almost eight months after the Certification Order, claimed for the first time that the Certification Order was improper under federal law. Keystone's Petition for Panel Rehearing Pursuant to Rule 40 of the Federal Rules of Appellate Procedure (9th Cir.). The Ninth Circuit denied the Petition. Rehearing Denial, Pet App. A at 1a.

Keystone has now petitioned for certiorari to challenge Keystone II and the Rehearing Denial on the ground that the Certification Order unconstitutionally or in violation of federal statute abdicated the Ninth Circuit's jurisdictional power.

ARGUMENT

Supreme Court Rule 10 provides that a "petition for writ of certiorari will be granted only for compelling reasons." "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct. Rule 10. Keystone relies on two of the considerations for certiorari

outlined in the Rule, claiming that the certification procedure in this case "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power," and that the Ninth Circuit's disposition of this case resolved an "important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. Rule 10(a), 10(c).

Neither consideration is satisfied here, however. The Ninth Circuit's Certification Order was usual and appropriate. It resulted in a clarification of Washington state law that precisely answered the certified question within the context of undisputed facts previously established on summary judgment. Further, this case did not raise any federal questions; therefore the Ninth Circuit did not resolve any issue of federal law, and its disposition did not conflict with decisions of this Court.

In any event, Keystone failed to object to the scope of the Certification Order on constitutional or statutory grounds until after decisions on the merits by the Washington State Supreme Court and the Ninth Circuit. As a result, this Court should hold that Keystone waived any such objection, and either refuse to grant certiorari or summarily affirm the decision below.

I. The Ninth Circuit's Certification Order Was Usual and Appropriate.

Under *Erie v. Tompkins*, 304 U.S. 64 (1938), federal courts in diversity cases must apply state law, as declared by the state's highest court. When the state law is unclear, the federal court must decide the case by predicting how the state's highest court would rule. *See, e.g., Nolan v. Transocean Air Lines*, 365 U.S. 293 (1961). The certification procedure used in this case has evolved, with this Court's

approval, as a means to ascertain state law even in diversity cases. *E.g., Lehman Bros. v. Schein*, 416 U.S. 386 (1974). And Keystone admits that this was a proper case for certification. Petition at 7-8.

Keystone objects, however, to the scope of the Certification Order on the ground that it requested the Washington State Supreme Court to determine whether Washington law would recognize and enforce a preliminary contract to negotiate "under the circumstances presented in this case." Keystone claims that after "extensive legal research," Keystone has "failed to locate ***any*** case" in which the law established on certification was applied to the particular facts of the case. Petition at 9-10, n.3 [emphasis in original].

Regardless of Keystone's lack of research results, federal cases have routinely certified questions specific to the case at hand, and state courts have routinely applied state law to the specific facts presented on certification. For example, in *Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704, 709, n.10 (1975), the Fifth Circuit[6] certified five fact-specific questions to the Alabama Supreme Court, including the following: "Is there an ambiguity between the policy and the Binding Receipt concerning the effective date of the policy? If so, ***which provision controls under the facts of this case***?" [Emphasis added]. In *Allen v. Estate of Carman*, 486 F.2d 490, 491-92 (5th Cir. 1973), the circuit court reversed a

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[6] The Fifth Circuit "has had by far the greatest experience with certification," and its decisions are widely recognized and followed. 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4248 at 176 (2d ed. 1988), pocket part at 35, n.59 (2004).

summary judgment order and entered partial summary judgment for the other party based on the Florida Supreme Court's answer to a certified question. The circuit court refused to remand the issue for trial because, based on "the whole record and all the facts that either party could dredge up on this issue," the Florida Supreme Court held that "the employee, as a matter of law, was not in the course of his employment." *Id*; *accord*, *National Ed. Ass'n. v. Lee County Bd. of Public Instruction*, 467 F.2d 447, 450 (5th Cir. 1972) ("The Supreme Court of Florida, having before it the briefs and entire record filed in this Court and deciding the question on the basis of precisely the facts that were before us, reached the opposite conclusion and held that 'the substance of the accord did not violate the public policy or the laws of Florida.' That determination must necessarily be conclusive."); *Boyd v. Bowman*, 455 F.2d 927, 928 (5th Cir. 1972) (Florida Court "determined that under the facts of the case, the insurance policy in question excluded liability coverage"); *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 398 (certifying to Virginia Supreme Court questions about application of Virginia statute to particular books and booksellers). The Ninth Circuit's Certification Order was well within the certification norm established by these cases.

Indeed, the practice of certifying case-specific questions inheres in the common law system. In decisions spanning over one hundred years, this Court has noted that a case-specific, step-by-step approach is a distinctive and valuable element of the common law. *E.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) ("incremental and reasoned development of precedent ... is the foundation of the common law system"); *Hurtado v. California*, 110 U.S. 516, 530 (1884) (the common law's "flexibility and capacity for growth" derives from the "peculiar advantage" that it evolves "only as the necessities of each case demand").

Moreover, state certification statutes specifically contemplate that the answer to the certified question will be framed by the federal court record. For example, under the Washington certification statute, the certification procedure must "include and be based upon" the federal court record, defined as "such part of the pleadings, proceedings, or testimony in the cause pending before the federal court, as in its opinion is necessary to enable the [state] supreme court to answer the question submitted." RCW 2.60.010(4), 030(2). The purpose of providing the federal court record "is to give the answering court a complete picture of the controversy so that the answer will not be given in a vacuum." UNIF. CERTIF. QUESTIONS OF LAW ACT § 3 comment, 12 U.L.A. 92 (1967); *see also* UNIF. CERTIF. QUESTIONS OF LAW ACT § 6, 12 U.L.A. 74 (1995) ("if parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order"); *c.f.*, S.Ct. Rule 19(1) (requiring factual record to be included with any certified question sent to this Court from a lower federal court).

Keystone asserts that application of state law to the case at hand is outside the proper scope of certification. Petition at 15-16. But the cases Keystone relies on are cited out of context. For example, in *Baker v. America's Mortgaging Servicing, Inc.*, 58 F.3d 321, 325 (7th Cir. 1995), the Seventh Circuit refused to certify the case to the state court because the "answers to the state law questions [were] reasonably clear," and application of ***clear law*** to particular facts is not a proper ground for certification. Likewise, in *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992), the question requested to be certified was a "fact specific, particularized" decision that "lack[ed] broad, general significance," and the state court decisions in analogous cases and general contract construction

principles provided enough guidance for the federal court to rule. In *Green v. American Tobacco Co.*, 325 F.2d 673, 674-77 (5th Cir. 1963), which Keystone claims shows that remand for trial is required after certification, the case was remanded for a new trial because the previous verdict was based on a jury instruction contrary to the law subsequently declared by the state supreme court. In short, none of the cases cited by Keystone holds it improper for the state court to apply the law it declares to facts established in the federal court proceedings.

Keystone also claims that it has failed, despite extensive research, to locate any case in which the state court answered a question that was dispositive of litigation pending in federal court. *Allen v. Estate of Carman*, 486 F.2d 490, 491-92 (5th Cir. 1973), and *National Education Association. v. Lee County Bd. of Public Instruction*, 467 F.2d 447, 450 (5th Cir. 1972), discussed above, are cases in which the state courts' opinions were dispositive. Moreover, under the Uniform Certification of Questions of Law Act of 1967, as adopted in Washington, certification is appropriate ***only*** when "it is necessary to ascertain the local law of this state ***in order to dispose of [the] proceeding***." RCW 2.60.020 [emphasis added]. Thus, Keystone's objection to the certification on the ground that the certified question was intended to be – and was in fact – dispositive of Keystone's negotiation claim must fail.

The Ninth Circuit's Certification Order was usual and appropriate. It did not deviate from the accepted and usual course of judicial proceedings.

II. The Washington State Supreme Court Precisely Answered the Certified Question Within the Context of the Undisputed Facts Established on Summary Judgment.

Keystone complains that the Washington State Supreme Court's resolution of the certified question deprived it of the opportunity to fully develop the facts in federal district court, thereby contravening the Ninth Circuit's Certification Order. On the contrary, Keystone had a full opportunity to and did develop the facts in the district court summary judgment proceedings. And, as specifically contemplated in the Certification Order, there were no unresolved issues of material fact in light of the Washington State Supreme Court's answer to the certified state law question.

A. Keystone Had a Full Opportunity to and Did Develop the Facts in the Summary Judgment Proceedings.

This matter arose on cross-motions for summary judgment, in which Keystone admitted that its claim for breach of an alleged contract to negotiate was ripe for summary judgment. *See* Plaintiff's Response to Xerox's Motion for Summary Judgment (dkt. no. 59) at 2. The parties presented the District Court with voluminous materials supporting and opposing their respective motions. *See* District Court record (dkt. nos. 27-32, 42, 44-47, 57-65); Ninth Circuit record (ER 1-132, Supp. ER 1-82).

In response to Xerox's motion for summary judgment dismissing the negotiation claim (and on Keystone's own motion), Keystone had the burden of coming forward with facts sufficient to constitute a contract to negotiate under Washington law. *See* Fed. R. Civ. P. 56(e); *Anderson v.*

Liberty Lobby, 477 U.S. 242 (1986). Keystone consistently told the District Court, the Ninth Circuit and the Washington State Supreme Court that the alleged contract to negotiate was formed by and contained in a series of letters dated March 8, 2001, April 4, 2001, April 6, 2001, and April 10, 2001. Plaintiff's Motion for Partial Summary Judgment (dkt. no. 42) at 21; Plaintiff's Reply Brief (dkt. no. 63) at 2; Appellant's Opening Brief (9th Cir.) at 6 ("the aforesaid letters ... constitute the documents forming the contract between the parties"); Appellant's Excerpts of Record (9th Cir.) (in its Table of Contents, Keystone marked "the documents forming the contract between the parties" with asterisks); Keystone Certified Question Brief, Resp. App. 2 at 22b (Keystone attached "a copy of the letters which form the written contract between Xerox and Keystone"). Keystone claimed that this alleged contract included an express covenant by Xerox "to negotiate a Purchase and Sale Agreement with Keystone," which incorporated the implied covenant of good faith and fair dealing and thereby committed Xerox to negotiate and draft the Purchase and Sale Agreement in good faith. Plaintiff's Motion for Partial Summary Judgment (dkt. no. 42) at 21. Keystone relied on both Washington law and cases in other jurisdictions that have enforced preliminary contracts to negotiate. *Id.* at 21-22, 24-27.

Conversely, Xerox argued that the alleged contract to negotiate was unenforceable under established Washington law. Xerox's Motion for Summary Judgment (dkt. no. 44) at 21-22. Xerox further argued at every level that even the cases in other jurisdictions that enforced preliminary contracts to negotiate would not find an enforceable contract to negotiate in this case. *E.g.*, Xerox's Response to Keystone's Motion for Partial Summary Judgment (dkt. no. 57) at 13-15; Appellee's Response Brief (9th Cir.) at 43-53; Xerox Certified Question Brief, Resp. App. 3 at 60b-73b. Xerox argued that

one reason the alleged contract failed under both Washington law and the standards for enforcing preliminary contracts to negotiate in other jurisdictions was that the parties' correspondence – the alleged contract – did not use language indicative of contractual commitment, but merely stated that Xerox was "prepared to negotiate" and could proceed to draft a Purchase and Sale Agreement with Keystone. Xerox's Reply Brief Supporting Summary Judgment for Xerox (dkt. no. 64) at 12; Appellee's Response Brief (9th Cir.) at 45-47; Xerox Certified Question Brief, Resp. App. 3 at 64b-65b, 67b-69b. Both parties fully articulated their arguments that the context of the negotiations supported their construction of the correspondence. *E.g.*, Plaintiff's Motion for Partial Summary Judgment (dkt. no. 42) at 26-27; Xerox's Response to Keystone's Motion for Partial Summary Judgment (dkt. no. 57) at 6-9, 13-14, 15; Plaintiff's Response to Xerox's Motion for Summary Judgment (dkt. no. 59) at 16-17; Appellant's Opening Brief (9th Cir.) at 10; Appellee's Response Brief (9th Cir.) at 51; Keystone's Certified Question Brief, Resp. App. 2 at 35b-37b.

In answering the certified question, the Washington State Supreme Court did not adopt any surprise legal standards. As to established Washington law refusing to enforce agreements to agree, the court ratified the District Court's ruling, relying on *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957), and *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 554-58, 608 P.2d 266, *rev. denied*, 93 Wn.2d 1030 (1980), the same cases Xerox had relied on in the District Court and Ninth Circuit. *Compare* State Supreme Court Opinion, Pet. App. C at 12a-13a, 17a-18a, *with* Reply Brief Supporting Summary Judgment for Xerox (dkt. no. 64) at 12, Summary Judgment Order, Pet. App. G at 43a, Appellee's Response Brief (9th Cir.) at 10, 43, 45-46. And in articulating the types of preliminary agreements and the criteria other

courts have used to enforce contracts to negotiate, the Washington State Supreme Court relied on authorities and cases Keystone had cited from the outset to support its argument that Washington law should enforce such agreements. *Compare* State Supreme Court Opinion, Pet. App. C at 13a-14a, *with* Plaintiff's Motion for Partial Summary Judgment (dkt. no. 42) at 24-27, Appellant's Opening Brief (9th Cir.) at 23-30, Keystone Certified Question Brief, Resp. App. 2 at 23b-33b. Xerox had always contended that the alleged contract to negotiate in this case failed to satisfy the criteria applied in those cases. *E.g.*, Xerox's Response to Keystone's Motion for Partial Summary Judgment (dkt. no. 57) at 13-15; Appellee's Response Brief (9th Cir.) at 43-53; Xerox Certified Question Brief, Resp. App. 3 at 60b-73b. The Washington State Supreme Court was the first court to resolve this issue, but the factual and legal arguments were fully litigated on summary judgment and in the Ninth Circuit. Thus, Keystone's argument to this Court (Petition at 17) that it "never had the opportunity to argue this case based on the elements established by the [Washington State] Supreme Court for a contract to negotiate" is absolutely false.

Moreover, even if the Washington State Supreme Court had adopted a novel legal standard, the facts material to that standard were already fully developed. Keystone has always claimed that the parties' alleged contract was formed by and found in their correspondence – a series of four letters dated March 8, 2001, April 4, 2001, April 6, 2001, and April 10, 2001. The fact that Keystone failed "to identify an offer and acceptance to be bound to specific standards of negotiating conduct for the formation of a separate substantive contract" (State Supreme Court Opinion, Pet. App. C at 16a) is attributable to the lack of any such offer and acceptance in that alleged contract, not to any lack of opportunity or motivation

by Keystone to present that (nonexistent) evidence. Keystone had a full opportunity to and did develop the facts on summary judgment; even if the case were remanded, those facts cannot change.[7]

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[7] Further, Keystone's argument that an evidentiary hearing is required to determine contractual intent reflects a fundamental misunderstanding of Washington contract law and the Washington State Supreme Court's Opinion. First, Washington follows the objective theory of contracts. Under this theory, it is the parties' objective manifestations of intent, not the intent itself, that determines whether the parties have formed a contract. *E.g.*, *Yakima County Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Second, the issue addressed by the Washington State Supreme Court was the ***construction*** of the alleged contract, not the ***interpretation*** of language used in it. "Construction of a contract determines its legal effect;" it is the process by which legal consequences are determined to follow from the terms of the contract, its context, and applicable legal policies. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990), *quoting* Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 835 (1964). In contrast, interpretation is the process whereby one person gives meaning to contractual language. *Id.* The Washington State Supreme Court resolved a contract construction issue: what legal consequences, if any, could flow from the correspondence between Xerox and Keystone? Under *Berg*, those consequences are determined as a matter of law, based on the parties' language, their situation, and relevant legal policies. Only if, as a matter of contract ***construction***, the parties' correspondence ***could have*** created an enforceable contract to negotiate, was there any reason to remand the case back to the District Court for contract ***interpretation*** – to determine whether the parties manifested a mutual intent to form such a contract. Because the Washington State Supreme Court answered the first, legal, question in the negative, the second, factual, question is immaterial.

B. The Certification Order Specifically Contemplated that the Washington State Supreme Court's Answer to the Certified Question Might Preclude the Need for Further Proceedings.

The Washington State Supreme Court precisely answered the Ninth Circuit's certified question. When the Ninth Circuit formulated that question, and when it issued its Clarification Order, it specifically contemplated that the Washington State Supreme Court's decision not to recognize and enforce the alleged contract to negotiate in this case would preclude the need for further proceedings. Certification Order, Pet. App. E at 32a; Clarification Order, Pet. App. D at 21a-22a. Thus, Keystone's argument that the State Supreme Court Opinion and Keystone II conflict with the Certification Order and the Clarification Order is simply false; it is based on selective and misleading quotations from those Orders.

In its Petition, Keystone egregiously mischaracterizes the Ninth Circuit's certification and clarification orders. The Ninth Circuit stated – twice – that its disposition would depend on whether Washington does or does not "recognize a contract to negotiate ***in this case.***" Certification Order, Pet. App. E at 32a; Clarification Order, Pet. App. D at 21a [emphasis added]. The Ninth Circuit's statement that genuinely disputed material facts would permit, though not compel, a rational jury to conclude that a contract to negotiate had been formed and breached applied only ***if*** the Washington State Supreme Court held that Washington law would recognize and enforce a contract to negotiate is ***in this case***. *Id.* Because the Washington State Supreme Court held the reverse, its Opinion – and the Ninth Circuit's application of that Opinion in Keystone II – do not conflict with the certification and clarification orders.

Indeed, in its Clarification Order, the Ninth Circuit confirmed that more was required to warrant a remand than a ruling that Washington law would ***ever*** enforce a preliminary contract to negotiate. The court stated that "if the Washington State Supreme Court prefers to limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and enforceable, then ***we will apply that law in further proceedings in this appeal***." Clarification Order, Pet. App. D at 22a [emphasis added]. Thus, the Ninth Circuit specifically clarified that it would determine the legal sufficiency of the alleged contract to negotiate in this case if the Washington State Supreme Court declined to do so. That is, contrary to Keystone's argument here, the Ninth Circuit viewed the question whether the alleged contract to negotiate was enforceable under Washington law as a legal question, which had to be addressed ***on appeal***. *Id*. The question posed to the Washington State Supreme Court – and the question that court answered – was the legal sufficiency of the undisputed facts, as outlined by the Ninth Circuit, to constitute an enforceable contract under Washington law. Because the Ninth Circuit's certification and clarification orders specifically contemplated that the resolution of that question might preclude the need for further proceedings, neither the State Supreme Court Opinion nor Keystone II conflicts with those previous orders.

III. The Court of Appeals Decision (Keystone II) Does Not Conflict With This Court's Prior Decisions.

Keystone claims that the Ninth Circuit decision in Keystone II conflicts with this Court's decisions in *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207 (1960), and *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). There is no conflict.

Clay was a diversity case in which this Court held: (1) that the lower court should have decided potentially dispositive issues of state law before reaching the federal constitutional issue; and (2) that, with or without a state facilitating statute, a federal court may certify a doubtful question of state law to the highest state court for decision. The language Keystone quotes is from Justice Douglas's ***dissent***, in which he criticized the majority for avoiding the federal constitutional question presented. 363 U.S. at 228. There was no federal question – constitutional or otherwise – presented in this case. Thus, *Clay* is inapposite here.

England is even farther afield because it is an abstention case, not a certification case. In *England*, this Court held that the abstention doctrine does not permit a federal court to relegate a litigant to a state-law determination of a federal constitutional claim. 375 U.S. at 415. A litigant who invokes federal question jurisdiction is entitled to a federal court process and a federal court decision on the federal claims; abstention should be limited to any associated state-law claims, unless the litigant chooses to pursue the federal claims in the state-court action. *Id.* at 416-22. There is no conflict between this case and *England* for at least the following reasons: (1) this case did not present any federal question, let alone a federal constitutional claim; (2) Xerox, not Keystone was the party who invoked the federal court's diversity jurisdiction by removing the case from state court, where Keystone filed it; (3) certification is a fundamentally different process from abstention; and (4) the summary judgment hearing, which established the undisputed facts summarized by the Ninth Circuit and relied upon by the Washington State Supreme Court, occurred in federal court.

There is no conflict between Keystone II and the decisions Keystone cites. Certiorari is also inappropriate under

Supreme Court Rule 10(c) because the Ninth Circuit did not resolve "an important federal question" – or, indeed, any federal question at all.

IV. Certiorari Should Be Denied Because Keystone Failed to Timely Raise the Certification Issue Below.

As a general rule, new issues cannot be raised on petition for rehearing. 16A CHARLES A. WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 3986.1 at 731-32 (3d ed 1999) (citing authorities). "The circuit court will not address legal theories raised for the first time in a petition for rehearing." 20A MOORE'S FEDERAL PRACTICE § 340.13 at 340-7-8 (Matthew Bender 3d ed) (citing *Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) (because Fed. R. App. P. 40(a) permits a petition to raise only points "the court has overlooked or misapprehended," it is limited to theories previously presented on appeal)). Likewise, with respect to appeals from state courts, this Court has noted the "long-established general rule ... that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

Edwards v. Basel Pharmaceuticals, 116 F.3d 1341, 1344 (10th Cir. 1997), is precisely on point. The court ruled that an objection to the terms of a certification order made on petition for rehearing after the state court had answered the certified question and the federal court of appeals had remanded the case based on that answer was, "to say the least, ... mistimed." *Id.*[8] The court stated (*id*):

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[8] The court nonetheless rejected the petition on the merits "to facilitate the proceedings on remand, which otherwise might be

> Basel ... did not object in any way to our certification order. ... Only now, after the supreme court has provided an unfavorable answer and we have remanded for further proceedings in accordance therewith, does Basel raise any objection regarding the nature of the mandate referred to in the certified question.

Like Basel, Keystone did not object to the Ninth Circuit's Certification Order, which was issued on December 31, 2003. Although Keystone now claims the Ninth Circuit's factual summary was inadequate and failed to comply with the standard of review in a summary judgment proceeding, Keystone adopted the Ninth Circuit's summary as its Statement of the Case in its brief to the Washington State Supreme Court. Keystone Certified Question Brief, Resp. App. 2 at 22b. Although Keystone now claims that the Ninth Circuit's request that the Washington State Supreme Court answer the certified question "under the circumstances presented in this case" was improper, Keystone devoted seventeen pages of its 45-page Certified Question Brief argument to a section titled, "Application of Law Relating to Agreements to Negotiate to Specific Facts of Keystone v. Xerox." *Id.* at 15b-16b, 35b-49b. And although Keystone now claims the Washington State Supreme Court improperly decided factual issues by basing its decision "exclusively on its review of certain correspondence exchanged between Keystone and Xerox" (Petition at 5), Keystone told the court (as it had told the District Court and Ninth Circuit) that those were "the letters which form[ed] the written contract between

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complicated needlessly by some of the same contentions," but emphasized that it did "not thereby condone the procedural course followed here." *Id.*

Xerox and Keystone" (Keystone Certified Question Brief, Resp. App. 2 at 22b).

Indeed, even after the Washington State Supreme Court heard oral argument on May 11, 2004 and Justice Alexander expressed concern about the Ninth Circuit's request for an answer to the certified question "under the circumstances of this case," Keystone still did not raise any constitutional, statutory or other legal objection to the certified question as framed. Keystone filed three separate briefs between the May 11, 2004 oral argument and the July 22, 2004 State Supreme Court Opinion, and none of them raised the issues on which Keystone now seeks certiorari. *See* Keystone's Clarification Motion (9th Cir.); Keystone's Motion for Permission to Submit Supplemental Briefs, Resp. App. 4 at 74b-80b; Reply to Xerox's Response to Keystone's Motion for Permission to Submit Supplemental Briefs, Resp. App. 4 at 89b-97b.

Rather, it was only after the Washington State Supreme Court "provided an unfavorable answer" and the Ninth Circuit disposed of the case in accordance with that answer that Keystone, like Basel, filed a Petition for Panel Rehearing, claiming for the first time that the certified question was improper. *See Edwards v. Basel*, 116 F.3d at 1344. Thus, as in *Edwards v. Basil*, "to say the least, then [Keystone's] ... protests are mistimed." *Id.*

Requiring timely objection serves important policy objectives. *E.g.*, *Woods v. Burlington N. R. Co.*, 768 F.2d 1287, 1292 (11th Cir. 1985). It fosters judicial economy by giving the court a meaningful opportunity to correct error, and it "prohibits counsel from 'sandbagging' the court by remaining silent and then, if the result is unsatisfactory, claiming error." *Id.* To serve these objectives, an objection to the scope of a certification order should be made ***before*** the

state court considers the certified question and renders its decision. Arguments that a certification order unconstitutionally or in violation of federal statute abdicates the federal court's diversity jurisdiction should be deemed waived when they are not asserted until after decisions on the merits by the state supreme court and the federal appellate court. Accordingly, this Court should deny certiorari or summarily affirm on the ground that Keystone waived its objections to the scope of the Certification Order by failing to raise them before the Petition for Panel Rehearing.

Conclusion

Xerox respectfully requests that this Court deny Keystone's Petition for Writ of Certiorari. In the alternative, Xerox requests that the Court summarily affirm the judgment below.

Xerox further requests the Court to award damages under Supreme Court Rule 42.2. Because it misstates the proceedings below, misstates the holdings of cases it relies on, and presents a question that was not timely presented to the Ninth Circuit, Keystone's Petition is frivolous.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 02-35847
[Filed December 31, 2003]

Keystone Land & Development Company, Plaintiff-counter-defendant-Appellant,	)
v.	)
Xerox Corporation, Defendant-counter-claimant-Appellee.	)

Appeal from the United States District Court for the Western District of Washington. D.C.

No. CV-01-01018-MJP
Marsha J. Pechman, District Judge, Presiding

Before: Stephen S. Trott, Raymond C. Fisher, and Ronald M. Gould, Circuit Judges. Opinion by Judge Gould

OPINION

GOULD, Circuit Judge:

This diversity case arises from a contract dispute. Plaintiff Keystone Land & Development Company ("Keystone") claims that it formed two binding contracts with Defendant Xerox Corporation ("Xerox"): a contract to buy a building owned by Xerox, and a contract to negotiate the terms of a Purchase and Sale Agreement for that building. Keystone filed suit for breach of contract in Washington state court and, to secure its claims, Keystone filed a *lis pendens* notice for the property. Xerox removed the case to federal court and filed a counterclaim for damages, and attorney's fees, caused by an allegedly improper *lis pendens*. The district court granted summary judgment to Xerox on its defense of the two contract claims asserted by Keystone, and also granted summary judgment to Xerox on its counterclaim. Keystone appeals these rulings. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the summary judgment dismissing Keystone's claim of a breach of contract to sell the building, and we reverse the summary judgment awarding damages to Xerox because of the *lis pendens*. In a companion published order, we certify to the Washington State Supreme Court the remaining dispositive question of state law before us, namely, whether Washington law may recognize a contract to negotiate in the circumstances presented by this case.

I

In early 2001, Xerox decided to sell and lease-back its facility in Tukwila, Washington. Xerox hired Jones Lang LaSalle ("Jones Lang") and Kidder Matthews and Sanger ("Kidder Matthews") to sell the property. Xerox sent detailed

information packets to prospective buyers, including Keystone. In a February 22, 2001 e-mail, Xerox requested a "signed Letter of Intent which includes the net purchase price and key deal points . . . ." Keystone, through its real estate broker, Broderick Group, sent a letter (the "Offer Letter") dated March 8, 2001, that made an "Offer to Purchase" the property. The letter had several contingencies, including the "Execution of a Purchase and Sale Agreement with [sic] thirty (30) days from the execution of this letter of intent." Kidder Matthews replied on April 4, 2001, thanking Keystone for the "Offer" and, as "directed by Xerox," requested that Keystone submit a "final and best offer" for the property that addressed certain concerns. Keystone responded through a letter dated April 6, 2001 by increasing its offering price. Referencing the March 8 letter, the April 6 letter stated that Keystone was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement." In an April 10 letter, Xerox's local brokers wrote that, subject to two modifications, Xerox was "prepared to negotiate a Purchase and Sale Agreement with Keystone," and that Xerox would "proceed immediately to draft" the Agreement if Keystone accepted the modifications. Keystone accepted the modifications on April 13.

Keystone prepared to inspect the property and Xerox's books and records concerning the property, reviewed documents, and arranged debt and equity financing. Xerox had delivered documents to Keystone and had hired legal counsel for drafting the Agreement. Xerox told Keystone that a draft was almost complete and would soon be ready for review. No employee of Keystone had discussed the transaction directly with any employee of Xerox. All communications to this point were between the parties' brokers.

Xerox had done minimal due diligence. Because Xerox had seen other prospective property sales collapse when lenders had backed out after learning that the deal included a lease-back to Xerox, it requested assurances from Keystone's lenders that financing would be available. Faced with vague answers given by an officer of Key Bank, Keystone's financier, Xerox became concerned about Keystone's suitability as purchaser and landlord.

On April 25, 2001, the City of Tukwila, the main competitor of Keystone for the property, submitted a revised proposal to buy the building for $ 500,000 more than Keystone offered. Xerox then decided to withdraw from negotiations with Keystone. That was the end of negotiations between Keystone and Xerox.

Keystone filed suit in state court on June 20, 2001 and recorded a *lis pendens* against the Tukwila facility. The action was removed by Xerox to the United States District Court for the Western District of Washington. Xerox filed a Fed. R. Civ. P. 12(b)(6) motion, asserting that the complaint did not state a claim. That motion was denied. Xerox then filed an answer on October 4, 2001, and added a counterclaim for damages from the *lis pendens* filing. Keystone released the *lis pendens* when it filed an amended complaint on January 18, 2002. On cross-motions for summary judgment, the district court granted Xerox's motion for summary judgment in defense of Keystone's suit on March 14, 2002. On July 12, 2002, the district court, addressing cross-motions for summary judgment on Xerox's counterclaim, awarded summary judgment to Xerox. The district court certified both

orders as final and Keystone appealed both summary judgment orders.[1]

II

We first address whether summary judgment was appropriate on Keystone's claim that Xerox breached a contract to sell the Tukwila facility. To survive summary judgment, Keystone must demonstrate disputed material facts regarding the existence of a contract to sell the Tukwila property.

Under Washington law, it is possible for parties to enter a binding contract even if the parties contemplate a more formal future document. *Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673 (1913); *Fuller v. Ostruske*, 48 Wn. 2d 802, 807, 296 P.2d 996 (1956). The party asserting the existence of the contract must prove that the terms of the contract are stated, agreed upon, and that the parties intended the terms to be a binding agreement before signing the formal document. *Loewi* at 484. Equally certain is that if the parties intended their legal obligations to be deferred until the execution of the formal writing, the preliminary writings and negotiations cannot

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[1] The district court's decision to grant summary judgment is reviewed de novo. *See Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002). We use the standard in Fed. R. Civ. Pro. 56©). *See, e.g., Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997). "Viewing the evidence in the light most favorable to the non-moving party," we must determine "whether there are any genuine issues of material fact" under the applicable substantive law. *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999). We do not weigh the evidence, but are concerned whether a rational trier of fact *might* resolve the issues in favor of the non-moving party. *T.W. Elec. Serv. v. Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987).

constitute a contract. *Plumbing Shop, Inc. v. Pitts*, 67 Wn. 2d 514, 520-21, 408 P.2d 382 (1965) (citing Restatement of Contracts § 26 cmt. a (1932)).

The question of a party's intent turns on the objective manifestations of that intent. *Morris v. Maks*, 69 Wn. App. 865, 871-72, 850 P.2d 1357 (1993). Whether summary judgment for Xerox was appropriate turns on whether there is disputed evidence in the record, viewed in the light most favorable to Keystone, that would allow a rational jury to conclude that the parties intended their preliminary writings to be an enforceable agreement, with the future Purchase and Sale Agreement serving only to memorialize the parties' prior contractual obligations.[2]

We consider whether a rational fact-finder could find, on the evidence submitted, that the parties intended a contract to exist as a result of the March 8, April 6, April 10, and April 13 letters. The four letters did not include specific language either disclaiming or supporting the formation of a contract. What is undisputed, however, is that the letters contemplated the future drafting of a Purchase and Sale Agreement.

Under Washington contract law, if parties contemplate drafting a later agreement, this is "strong evidence to show that they do not intend the previous negotiations to amount to any proposal or acceptance." *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 556, 608 P.2d 266 (1980)

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[2] Under Washington contract law, extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent. *Berg v. Hudesman*, 115 Wn. 2d 657, 667, 801 P.2d 222 (1990).

(quoting *Coleman v. St. Paul & Tacoma Lumber Co.*, 110 Wash. 259, 272, 188 P. 532 (1920)). This alone would be sufficient to find that the parties lacked the intent to contract based upon the four letters. *See Plumbing Shop*, 67 Wn. 2d at 521 ("If an intention is manifested in *any way* that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.") (citing Restatement of Contracts § 26 cmt. a (1932)) (emphasis added).

Further, the other language in these letters, even when viewed in a light most favorable to Keystone as non-moving party, does not support a finding of an intent to reach a binding contract in the preliminary exchange of views. The exchange of letters explicitly called for the creation of a future "binding" Purchase and Sale Agreement; to refer to the future agreement as "binding" implies that preliminary communications are not.

This case is strikingly similar to the decision in *Nimmer*, 25 Wn. App. 552, 608 P.2d 266. In *Nimmer*, a real estate developer gave Nimmer three proposals, and Nimmer expressed interest in one. Nimmer prepared a letter of intent[3] based on the proposal he liked. The developer thought a deal had been struck and sent Nimmer a draft lease. Nimmer did not sign the lease and the developer sued for breach of contract. The Washington Court of Appeals held that the correspondence did not contain any promises, and the letter of intent was "evidence of a future contractual intent." *Nimmer*, 25 Wn. App. at 556. The description of Washington law and the resulting decision in *Nimmer* persuade us that summary

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[3] Similarly, although the March 8 letter was titled an "Offer Letter," the text of the letter referred to itself as a "letter of intent."

judgment for Xerox was appropriate. We reject the theory that a contract was formed to sell the building, for we think on that issue all of the evidence shows only a "future contractual intent."[4]

The conclusion that the letters do not provide evidence of an intent to form a contract to sell the building is reinforced by examining the context of the negotiations. It is undisputed that binding letters of intent to enter into land contracts executed by brokers are highly unusual. If preliminary letters between brokers, which refer only to an intent to enter a formal and binding Purchase and Sale Agreement, could effectuate a transfer of a multi-million dollar building, that would certainly be extraordinary. Moreover, the "Offer Letter" was submitted in response to Xerox's solicitation which called for a "Letter of Intent" and Xerox had instructed Keystone not to submit a draft Purchase and Sale Agreement in response to Xerox's solicitation. These facts, relevant under the "context" rule explained in *Berg v. Hudesman*, 115 Wn. 2d 657, 667, 801 P.2d 222 (1990), reinforce that Keystone did not present evidence sufficient to raise a genuine issue of material fact on the parties' intent to contract to sell the building through the mere exchange of letters.

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[4] *Nimmer* was apparently under appellate review after the trial court had reached a judgment on the contract claims after trial. The court noted that "the trial court weighed the evidence," and the appellate court found "substantial evidence to support the court's conclusion . . . ." *Nimmer*, 25 Wn. App. at 555, 558. Although Keystone's claims of breach of an agreement to sell the building were resolved on summary judgment, the principles of Washington contract law discussed in *Nimmer* persuade us that the letter exchange of the parties here did not manifest a contractual intent to be bound before execution of the formal Purchase and Sale Agreement expressly contemplated in the letters.

When we examine the four letters in their context, in a light most favorable to Keystone, we conclude that there is no basis from this evidence for a rational jury to find that Keystone and Xerox had entered a contract to sell the building. Summary judgment rejecting Keystone's claim of breach of contract to sell the building was appropriate and we affirm the district court on that issue.

III

We next address Keystone's appeal challenging the summary judgment for Xerox on its counterclaim based upon Keystone's *lis pendens* filing. For Keystone to avoid judgment in favor of Xerox on the *lis pendens* counterclaim, Keystone must only demonstrate that it had a "substantial justification for filing the *lis pendens*." Wash. Rev. Code § 4.28.328. The only reported case interpreting this provision is *Richau v. Rayner*, 98 Wn. App. 190, 988 P.2d 1052 (1999). The *Richau* court held that the plaintiffs had no substantial justification for filing a *lis pendens* when the plaintiffs were aware that they did not have any legal right to the property claimed. *Richau* at 198. The district court acknowledged that the issue of contract formation was difficult, and if the case were based only on that question, Keystone's *lis pendens* filing may have been substantially justified. However, the district court reasoned that Keystone should have known that the alleged contract violated the statute of frauds, making any potential contract unenforceable. Thus the district court concluded that the *lis pendens* filing was not substantially justified.

We take a different view of Washington law and conclude that the district court was mistaken in giving summary relief to Xerox on the counterclaim. It is true that if Keystone were able to demonstrate a contract, Washington's statute of frauds

would have applied to the contract for the sale of real estate. *See* Wash. Rev. Code § 64.04.010. Keystone had a good faith position, however, that if there were a contract from the letter exchange, then it might be argued further that a provision of that contract was that Xerox was to prepare the Purchase and Sale Agreement. If so, Keystone could urge that Xerox be prevented by estoppel from relying on the statute of frauds to prevent enforcement of the underlying contract. *See Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn. 2d 255, 259-60, 616 P.2d 644 (1980) ("A party who promises, implicitly or explicitly, to make a memorandum of a contract . . . and then breaks that promise, is estopped to interpose the statute . . . [against one] who relied [on the promise] to his detriment." (quoting *In re Estate of Nelson*, 85 Wn. 2d 602, 610-11, 537 P.2d 765 (1975)).[5]

The district court did not address the *Klinke* estoppel claim in the substantial justification inquiry. Given the possibility that Xerox could have been estopped from asserting the statute of frauds as a defense, whether Keystone had substantial

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[5] In *Klinke*, the Washington Supreme Court held that the defendant was estopped from raising the statute of frauds to defeat enforcement of an oral contract because the defendant had promised, but failed, to draft a writing that satisfied the statute of frauds. *Klinke* involved a person who gave up a job in Alaska and moved to the state of Washington to engage in a franchised business, only thereafter to have the franchisor disclaim the oral contract based on the statute of frauds. Though it might have required an extension of *Klinke* to apply its stated rule in this case, on facts less compelling than those presented in *Klinke*, the relevant question for *lis pendens* liability is whether Keystone had a "substantial justification" for filing the *lis pendens*, not whether the underlying claim would necessarily succeed.

justification for filing the *lis pendens* depends on the strength of the claim that there was a contract to sell the building in the first instance.[6] We have rejected this claim in our discussion above, but we have not said that there was no justification to assert the claim. Like the district court, we determine that the question of contract formation is difficult, and on that basis, adopt the view that Keystone had substantial justification for claiming the existence of a contract to sell the building, and conclude that summary judgment for Xerox on the *lis pendens* counterclaim was erroneous. We reverse the grant of summary judgment to Xerox on this issue.

We further conclude that in the unusual circumstances of this case, summary judgment should be entered in favor of Keystone on its motion for summary judgment on the counterclaim asserting damages from an alleged improper filing of the *lis pendens*.[7] To award summary judgment to

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[6] We recognize that Washington law requires a higher showing to award the remedy of specific performance of a breached land contract, as opposed to the remedy of an award of money damages for the breach. *See Kruse v. Hemp*, 121 Wn. 2d 715, 722, 853 P.2d 1373 (1993). It is arguable whether the asserted contract met all of the necessary requirements for specific performance. *See id.; Hubbell v. Ward*, 40 Wn. 2d 779, 782-83, 246 P.2d 468 (1955). On the other hand, Keystone provided evidence that an escrow agent opined that "the letters contain all the essential terms required to complete closing of the sale of the Xerox building . . . ." We conclude that, even if Keystone might not have prevailed at trial in gaining specific performance, it had sufficient chance so that substantial justification existed for filing the *lis pendens*.

[7] Although Keystone did not appeal the district court's order denying its cross motion for summary judgment, we may properly grant summary judgment to Keystone based upon our review of Xerox's summary judgment motion. *See Lawyers Title Ins. Co. v.*

Keystone on the *lis pendens* counterclaim, we must accept the facts alleged by Xerox and give Xerox all favorable inferences. *See infra* note 1. But even so, Xerox has not contested that in its letters it said it would draft the Purchase and Sale Agreement. Because there was substantial justification to bring the claim of breach of contract to sell the building, even though we reject that claim, and because on undisputed facts Keystone could assert an estoppel argument in good faith, even though we take no position whether it would have succeeded at trial if the contract claim were otherwise good, this case does not appear to be one where the remedy of damages for wrongful filing of a lis pendens should be awarded. We hold that Keystone is entitled to summary judgment on Xerox's counterclaim, and we instruct the district court on remand to enter summary judgment for Keystone, dismissing the *lis pendens* claim.

Honolulu Fed. Sav. & Loan Ass'n, 900 F.2d 159, 164 (9th Cir. 1990) (noting that where the record supports only one resolution of the factual issue, the reviewing court may order the trial court to enter judgment on that issue); *Martinez v. United States*, 669 F.2d 568, 570 (9th Cir. 1981) ("under proper circumstances, an appellate court may order the district court to enter summary judgment for the non-moving party."). Though we recognize that this approach is, and ought to be, a relatively rare phenomenon, *see E.C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir. 1976), because there were cross-motions for summary judgment before the district court, we are confident that the record has been sufficiently developed by both parties to permit our conclusion that the record supports directing summary judgment for Keystone.

IV

We affirm the district court's order granting summary judgment to Xerox on Keystone's claim for breach of contract to sell the building. We reverse the district court's order granting summary judgment to Xerox on its *lis pendens* counterclaim; on remand, the district court is instructed to enter summary judgment in favor of Keystone on the *lis pendens* counterclaim.

We stay the issuance of the mandate and retain control of the case until we resolve the final issue presented in the companion certification order. [8]

AFFIRMED IN PART, REVERSED IN PART WITH INSTRUCTIONS

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[8] With regard to the issues decided in this opinion, the normal rules governing petitions for rehearing and petitions for rehearing en banc shall be applicable.

APPENDIX 2

**CERTIFICATION FROM
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT
IN**

**No. 74904-3
[Received January 30, 2004]**

KEYSTONE LAND & DEVELOPMENT CO.,
Appellant,

v,

XEROX CORPORATION,
Appellee.

(Court of Appeals No. 02-35847)

**BRIEF OF KEYSTONE LAND
& DEVELOPMENT COMPANY
Appellant**

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Charles L. Knapp, *Contract to Bargain,* 44 N.Y.U.L. Rev. 673 (1969) 9, 10, 11, 14, 15, 29,32, 41, 43, 46, 49

E. Allan Farnsworth, *Farnsworth on Contracts,* §3.26a, §3.26b and §3.26c (2d ed. 1998) 9, 16, 28, 43, 46

E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 660 (1963) 5

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Melvin Aron Eisenberg, *Symposium of the Law in the Twentieth Century: The Emergence of Dynamic Contract Law*, 88 Cal. L. Rev. 1743, 1796 (2000) 6, 10, 11, 16,17, 18, 22, 27, 39, 43, 46

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Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980) 6

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[p.1]

I. CERTIFIED QUESTIONS

The following questions have been certified by the United States Court of Appeals for the Ninth Circuit to this Court for resolution:

1. Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?

2. If such a contract can exist, what is the proper measure of damages for the breach of a contract to negotiate?

II. STATEMENT OF THE CASE

Except for the final two paragraphs, the following is a verbatim summary of facts as determined by the Ninth Circuit Court of Appeals, which is adopted herein as the Statement of the Case. Appellant's Opening Brief filed with the Ninth Circuit contains Keystone's Statement of Facts, including citations to the record on appeal. All references to the record herein are to the Excerpts of Record ("ER") filed with the Ninth Circuit, rather than to the Clerk's Papers ("CP") customarily filed with this Court. The Excepts of Record have been forwarded to this Court by the Clerk for the Ninth Circuit.

In early 2001, Xerox decided to sell and leaseback its facility in Tukwila, Washington. Xerox hired Jones Lang LaSalle ("Jones Lang") and Kidder Matthews and Sanger [sic] ("Kidder Matthews") to sell the property.

[pp. 2-4 omitted]

* * *

[p.5]

The Appendix hereto contains for convenient reference a copy of the letters which form the written contract between Xerox and Keystone, specifically: Keystone's March 8, 2001, Offer to Purchase (ER 9-15); Xerox's April 4, 2001, request for a final and best offer (ER 93); Keystone's April 6, 2001, Amendment to Offer to Purchase (ER 16); Xerox's April 10, 2001, counteroffer (ER 17); and Keystone's April 13, 2001, acceptance of Xerox's counteroffer (ER 18).

III. ARGUMENT

A. Consistent with the Modern Trend in Contract Law, Agreements to Negotiate Should Continue to Be Enforceable in Washington.

1. A Historical Perspective on Agreements to Negotiate.

Prior to the turn of the twentieth century the common law did not recognize the existence of an obligation to perform contractual duties in good faith. Spurned by prominent law review articles published in mid-century by Professors E. Allan Farnsworth and Robert S. Summers[1], such an obligation evolved to the extent that it could be said in 1980 that "[a] majority of American jurisdictions, the Restatement (Second) of Contracts, and the Uniform Commercial Code (U.C.C.) now recognize the obligation to perform [p.6] a contract in good faith as a general principle of contract law." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith,* 94 Harv. L. Rev. 369 (1980). Accordingly, Washington law now clearly provides that in every contract there is an implied covenant which requires each party to fully cooperate in good faith with the other party in order that they can mutually benefit from the intended performance of the contract. *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966).

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[1] E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 660 (1963); Robert S. Summers, *"'Good Faith'" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 Va. L. Rev. 195 (1968).

As a historic parallel, it has been indicated that in the formation of contracts "[c]lassical contract law did not recognize a duty to negotiate in good faith. On the contrary, it adopted the rule that an agreement to agree was unenforceable, which by implication precluded an obligation to negotiate in good faith." Melvin Aron Eisenberg, *Symposium of the Law in the Twentieth Century: The Emergence of Dynamic Contract Law,* 88 Cal. L. Rev. 1743, 1796 (2000) [hereinafter Eisenberg][2]. However, "recogniz[ing] that the formation of a contract may be a dynamic,[p.7] evolving process", contract law in response has advanced to generally recognize the enforceability under appropriate circumstances of an agreement to negotiate. *Id*, at 1796-97. In the case now before this Court, the Ninth Circuit has authoritatively characterized this development as representing "the modern trend in contract law." Ninth Circuit's Order dated December 31, 2003 at 18327. *See, e.g., Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 117 Cal. Rptr.2d 875, 882 (2002) ("[m]ost jurisdictions which have considered the question have concluded a cause of action will lie for breach of a contract to negotiate the terms of an agreement"); *Howtek, Inc. v. Relisys,* 958 F. Supp. 46, 48 (N.D.N.H. 1997) ("[t]he modern view, and the view endorsed by most scholars, is that agreements to negotiate in good faith, unlike mere 'agreements to agree', are not unenforceable as

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[2] As long ago promulgated by Lord Wenseydale in *Ridgeway v. Wharton,* 10 Eng. Rep. 1287, 1313 (H.L. 1857): An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled he is perfectly at liberty to retire from the bargain.

a matter of law"); *Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625,629 (Del. 1968) (under Pennsylvania law a letter of intent where both sides agreed to "make every reasonable effort to agree upon a formal contract" obligated them to attempt in good faith to reach final and formal agreement); *Channel Home Centers v. Grossman*, 795 F. 2d 291,298-300 (3d Cir. 1986) (although "it is hornbook law that evidence of preliminary negotiations or an agreement to enter into a binding contract in the future does not alone constitute a contract", the parties nevertheless intended to enter into a binding agreement [p.8] to negotiate such an agreement in good faith); *Thompson v. Liquichimica of America, Inc.*, 481 F. Supp. 365, 366 (S.D.N.Y. 1979) ("[u]nlike an 'agreement to agree', which does not constitute a 'closed' proposition, and consequently is not an agreement at all, an agreement to use best efforts is a closed proposition, discrete and actionable"); *Fickes v. Sun Expert, Inc.*, 762 F. Supp. 998, 1001 (D. Mass. 1991) (even if a letter specifically indicated that it was not binding, parties' "objective intentions to negotiate along the parameters of the letter of intent" could provide a basis for concluding that defendants did not negotiate in mood faith); *Venture Assoc. Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 433 (7th Cir. 1993) (even if the underlying agreement was unenforceable due to missing terms, under Illinois law the complaint "states a cause of action for failure to negotiate in good faith under the parties' preliminary agreement"); *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597, 606-07 (S.D.N.Y. 1971) (the obligations contained in a letter of intent "conditioned upon the execution of a mutually acceptable purchase and sale agreement ... surely would not normally permit the other contracting party simply to do nothing and defeat the drafting of any purchase agreement at all"); *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 239 (N.D.Ill. 1976) (a letter of intent providing that the parties

intended to enter into a formal lease agreement imposed on them an [p.9] obligation to negotiate the lease in good faith); *Chase v. Consolidated Foods* Corp., 744 F.2d 566, 571 (7th Cir. 1984) (although a letter of intent was expressly subject to the negotiation of a definitive agreement and board approval, a jury "could readily have concluded" that a party who abandoned the transaction had violated a binding commitment to negotiate in good faith); *A/S Apothekernes Laboratorium v. I.M. C. Chemical Group,* 873 F.2d 155; 158 (7th Cir. 1989) (duty to negotiate prohibits "renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the or preliminary agreement"); *American Broadcasting Co. v. Wolf,* 420 N.E.2d 363 (N.Y. 1981).

Moreover, the preeminent commentators on contract law have uniformly supported the "modern trend in contract law", as determined by the Ninth Circuit, relating to the enforceability of agreements to negotiate. See, Charles L. Knapp, *Enforcing the Contract to Bargain,* 44 N.Y.U.L. Rev. 673 at 727 (1969) [hereinafter "Knapp"] ("Recognition of the contract to bargain would have a beneficial effect on 'the law' itself - upon the quality of legal decision-making and the decisions it creates"); E. Allan Farnsworth, *Farnsworth on Contracts*, §3.26a at 363 (2d ed. 1998) [hereinafter "*Farnsworth on Contracts*"] ("the view taken in [the leading cases of] *Itek* and *Channel* has gained a substantial following, and the trend clearly favors [p.10] enforceability. At least this is so where the parties have reached agreement on a significant number of the major terms of the ultimate agreement": Eisenberg at 1796-97 ("Modern contract law" [has generally accepted the] dynamic rule that there is an obligation under appropriate circumstances to negotiate in Rood faith"); Steven J. Burton and Eric G. Andersen, *Contractual Good Faith: Formation, Performance, Breach, Enforcement* (1995) [hereinafter "Burton and Andersen"],

§8.4.1, p.49-50 ("The parties presumably will not go to the trouble of forming a preliminary agreement if they do not also commit themselves to a final contract. Particularly where the parties have made the effort to negotiate some of the key terms of the final contract, a court is likely to find that they also committed themselves to make efforts to agree on the remaining points").

2. Freedom to Contract Provides the Legal Basis for an Agreement to Negotiate.

Fundamentally, the foundation of a legally enforceable agreement to negotiate rests on the parties' inherent freedom to contract as they see fit. Under the Restatement a "contract" by definition is based on a "promise [which] is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Restatement of the Law of Contracts (Second)*, §§ 1 and 2. Thus, as summarized by Knapp: "parties do often wish to register [p.11] in an effective way their common commitment to an agreement, while reserving the privilege of differing over points not yet settled. If they have made such an agreement, the law has no business telling them their act of agreement was devoid of legal significance." Knapp at 728.[3] *See also*, E. Allan Famsworth,

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[3] A significant Second Circuit case on preliminary agreements stressed the importance of respecting the parties' intentions in considering preliminary agreements because "it is equally important that courts enforce and preserve agreements that were intended as binding, despite a need for further documentation or further negotiation. It is, of course, the aim of contract law to gratify, not to defeat, expectations that arise out of intended contractual agreement." *Teachers Ins. & Annuity Ass'n. v. Tribune Company*, 670 F. Supp. 491,498 (S.D.N.Y. 1987).

Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations [hereinafter "Farnsworth Law Review"], 87 Colum. L. Rev. 217 at 236 ("A more common basis for precontractual liability would seem to be the specific promises that one party makes to another in order to interest the other party in the negotiations"); Eisenberg at 1801 ("Viewed in light of the basic principles of contract law, [the leading cases of] *Itek* and *Channel Home are* in some sense unremarkable cases. In each case, a party made a promise and broke it."); Arthur L. Corbin and Joseph M. Perillo, *Corbin on Contracts,* §2.8, p. 133 (Rev. Ed. 1993) ("It is quite possible for parties to make an enforceable contract binding them to prepare and execute a subsequent final agreement.")

[p.12]

As recently summarized by the Ninth Circuit in *Vestar Development II v. General Dynamics Corp.*, 249 F.3d 958 (9th Cir. 2001):

> The fact that the parties commence negotiations looking to a contract, or to the amendment of an existing contract, does not by itself impose any duty on either party not to be unreasonable or not to break off negotiations, for any reason or no reason. *During the course of negotiations things may be done which do then impose a duty of continued bargaining only in good faith .... For instance ... in anticipation of an agreement the parties may, by letter of intent or otherwise, agree that they will bargain in good faith for the purpose of reaching an agreement.*

Id. at 961 (emphasis added).

The above legal principles were recently applied by the California Court of Appeals in *Copeland v. Baskin Robbins, U.S.A.*, supra. Although "a variety of complex terms remained for agreement", *Copeland* held that the contracting parties had committed to negotiate in good faith the remaining terms of a "co-packing" agreement to buy and sell manufactured ice cream.
The court stated:

> Initially, we see no reason why in principle the parties could not enter into a valid, enforceable contract to negotiate the terms of a co-packing agreement. A contract, after all, is "an agreement to do or not to do a certain thing." Persons are free to contract to do just about anything that is not illegal or immoral. Conducting negotiations to buy and sell ice cream is neither.

Id. 117 Cal.Rptr.2d at 880.

[p.13]

In analyzing the applicable case law, especially the older decisions, it is of critical importance to clearly distinguish between the agreement to negotiate, on the one hand, from the contract which is ultimately contemplated to result from the negotiations, on the other hand. As correctly noted in *Copeland:* "it is important to note courts which have found purported contracts to be unenforceable 'agreements to agree' have focused on the enforceability of the underlying substantive contract, not on whether the agreement to negotiate the terms of that contract is enforceable in its own right." *Id.* at 881. Similarly, after the court in *Vestar Development II,* reviewed the then unsettled state of California law relating to agreements to negotiate, it concluded that

although the language in these decisions "when taken out of context" appears to support the unenforceability of agreements to negotiate, they were all decided based on an analysis of "the underlying substantive contract." The court then properly focused its attention on the agreement to negotiate. *Vestar Development II,* 249 F.3d at 961.

3. Policy Reasons Supporting the Enforcement of Agreements to Negotiate.

Traditional contract law developed over the years based on the seductively simple rules governing an "offer" which generated an "acceptance". However entrenched these rules may be, Professor Famsworth [p.14] has argued in support of the enforceability of an agreement to negotiate as follows:

> But however suited these rules may have been to the measured cadence of contracting in the nineteenth century, they have little to say about the complex processes that lead to major deals today .... The negotiations are a far cry from the simple bargaining envisioned by the classic rules of offer and acceptance, which evoke an image of single-issue, adversarial, zero-sum bargaining as opposed to multi-issue, problem-solving, gain-maximizing negotiation.

Farnsworth Law Review at 219-20.

The evolution of the common law relating to agreements to negotiate owes its genesis to Professor Charles L. Knapp's 1969 law review article on *Enforcing the Contract to Bargain*, 44 N.Y.U.L. Rev. 673 (1969), which Corbin has characterized as constituting the "seminal article" on the subject. Arthur L. Corbin and Joseph M. Perillo, *Corbin on*

Contracts, §2.8, p. 131, fn. 1 (Rev. Ed. 1993). Based heavily on the UCC's tendency of "doing away with 'outmoded' rules of law to the extent that they diverge from what businessmen regard as appropriate norms of conduct", Professor Knapp states the following as the underlying premise for enforcing agreements to negotiate: "If a class of transactions exists in which the law as presently conceived and administered fails to accomplish the goal [of shaping decisions to respond to the reality of commerce], then certainly the Code, and perhaps the common law as well, should attempt to adjust existing rules to [p.15] accommodate to the facts of business life." Knapp at 678-79. Thus, arguing in favor of "a movement away from fiction and toward reality"[4], Professor Knapp believes that "there are in fact many situations in which at some stage of negotiations the views of the negotiating parties as to their own 'duty to go forward' would be somewhere between the extremes..." of the common law's rigid adherence to a "contract or no-contract" framework of analysis. *Id*, at 676. Professor Knapp generally categorizes these situations as involving either "agreement to agree" or "formal contract contemplated" cases. *Id*, at 676.

When this critical stage of the negotiating process is achieved, Professor Knapp concludes that the negotiating parties do consider themselves "morally" or "ethically" bound to proceed to continue with the pursuit of concluding the transaction. *Id.* at 679. "On this assumption, the principals are likely to feel ethically bound to the outlines of the deal as they have hammered it out, the withdrawal of either one based simply on dissatisfaction with those outlines being regarded by both as admittedly unjustified." Knapp at 684. This is the essence of "the modern trend's" justification for requiring

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[4] Knapp at 727.

parties to a "preliminary agreement" to continue [p.16] negotiating in good faith in order to endeavor to reach a final consensus on the terms of the contractual undertaking.

4. Nature and Scope of an Agreement to Negotiate.

The parties to an agreement to negotiate are obligated to negotiate in good faith in order to attempt to reach agreement on the ultimate terms of the contemplated contract, but they are not required to accomplish this result. These negotiations must be conducted in good faith either because all contractual obligations must be performed in good faith or "when a party is under an obligation to negotiate, the only way to make sense out of that obligation is to require that the party negotiate in good faith." Eisenberg at 1802. Professor Farnsworth has summarized the nature of the obligation to negotiate as follows:

> A preliminary agreement to negotiate may also set out specific substantive terms of the deal, but, in contrast to an agreement with open terms, the parties do not agree to be bound as to these terms. They undertake instead to continue the process of negotiation in order to reach an ultimate agreement. If the agreement to negotiate is enforceable, a party will be liable if a failure to reach ultimate agreement results in a breach of that party's obligation to negotiate. If, despite continued negotiation by both parties, ultimate agreement is not reached the parties are not bound by any agreement.

Farnsworth on Contracts, §3.8a, p.215; *See also, Copeland,* 117 Cal. Rptr.2d at 880-81 ("A party will be liable only if a failure to reach ultimate agreement resulted from a breach of

that party's obligation to negotiate in good faith. [p.17] For these reasons, criticisms of an 'agreement to agree' as 'absurd' and a 'contradiction in terms' do not apply to a contract to negotiate an agreement.")

5. Evaluation of "Good Faith" Negotiations.

The obligation to negotiate in "good faith" precludes a "party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement." *Teachers Ins. & Annuity Ass'n,* 670 F.Supp. at 498. In essence, it prohibits "bad faith" conduct during the course of contract negotiations, which is a salutary goal under any circumstances. Although it may be challenging in some cases to determine when the absence of good faith is present, a judge or jury is in the best position to make this decision after hearing all the evidence in a particular case. However, as a practical matter, in most cases it is patently obvious when a party to contract negotiations is acting in bad faith.

Professors Burton and Andersen prefer an "excluder analysis" based on which "the function of 'good faith' is not to contribute positively to the characterization of anything, but to exclude possible ways of being in bad faith, which are both numerous and varied." Burton and Anderson, §2.2.3, p. 37. Responding to the problems associated with administering "good faith" in negotiations, Professor Eisenberg has commented as follows:

[p.18]

> Such an objection would not be well-taken. In most cases, there is no real doubt about this issue, because the defendant clearly shows bad faith by negotiating

> with third parties, as in *Itek* and *Channel Home,* or by breaking off negotiations with no good reason .... In any event, a party who is negotiating in bad faith typically leaves so many footprints that the determination that he negotiated in bad faith will be very easy.

Eisenberg at 1807-08.

The decided cases on agreements to negotiate certainly validate the presence of Professor Eisenberg's "footprints" in broken transactions, especially when, as in this case, the defaulting party is seduced by a superior bargain. *See, e.g., Itek Corp. v. Chicago Aerial Industries, Inc., supra.* (commitment to "make every reasonable effort to agree" disregarded when a previous suitor renewed its interest in making the acquisition); *Vestar Development II, supra.* (Vestar's negotiations for a 50-acre parcel of land were proceeding forward until General Dynamics received a proposal to purchase its entire 240 acre tract); *Channel Home Centers v. Grossman, supra* (lease negotiations with Channel Home abruptly terminated when Mr. Good Buys submitted a more attractive proposal); *American Cyanamid Co. v. Elizabeth Arden Sales Corp., supra.* (negotiated acquisition was in the process of being submitted for board approval until Elli Lilly & Co. tendered a more lucrative proposal); *Venture Assoc. Corp. v. Zenith Data Systems*

[pp. 19-30 omitted]

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[p.31]

Similarly, although *Copeland v. Baskin Robbins, U.S.A.,* contains some *dicta* broadly suggesting that the recovery of expectation damages may be an inappropriate remedy for

breach of an agreement to negotiate, the court's holding as to damages was specifically limited. "Satisfactory proof of such [expectation] damages is impossible because there is no way to know what the eventual terms of the co-packing agreement would have been, or even if the parties would have reached an agreement." *Copeland* at 886. Significantly, in *Copeland* a "variety of complex terms" remained to be negotiated, critically including ice-cream purchase price, flavors to be manufactured, quality control standards, responsibility for waste and spoilage and various trademark protection issues. *Id.* at 879-80.

C. APPLICATION OF LAW RELATING TO AGREEMENTS TO NEGOTIATE TO SPECIFIC FACTS OF KEYSTONE V. XEROX.

1. Xerox Agreed to Prepare the Purchase and Sale Agreement and Negotiate Its Terms in Good Faith.

a. Context of Negotiations.

This case represents a textbook situation for the application of the principles supporting the enforceability of an agreement to negotiate. Following the completion of extensive back-and-forth negotiations, Keystone and Xerox had reached agreement on all the terms for the sale of Xerox's building. Both the district court and the Ninth Circuit, however, concluded [p.32] that the parties did not intend to enter into a full-blown, legally enforceable contract to buy and sell the building, primarily because Keystone and Xerox

contemplated the execution of a formal purchase and sale agreement to memorialize the transaction.[7]

In accordance with the proper analysis of an agreement to negotiate, the fundamental question for ultimate resolution in this case is whether the negotiations between Keystone and Xerox had advanced to the point where the law should impose on the parties a "duty to go forward". Professor Knapp, in his landmark article on the enforceability of agreements to negotiate, long-ago provided the following framework for the evaluation of intentions in the context of contract negotiations:

> What manifestation of intention will serve to create a contract to bargain? The essential question is whether the parties have expressed both satisfaction with and commitment to the essential terms of the proposed transaction, to the extent that each would reasonably regard the other as unjustified in withdrawing for any reason other than a failure---after negotiation in good faith---to arrive at a complete and final agreement.

Knapp at 720. (emphasis added). [p.33]

Contractual intentions must be evaluated based on the parties' objective manifestations of intent. *Morris v. Maks,* 69

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[7] Farnsworth has made the following observations regarding the "problem of intent" with respect to preliminary agreements: "This problem is particularly troublesome when the agreement is preliminary rather than ultimate because me parties" anticipation of a later agreement invites the argument that they do not intend to be bound if they should fail to agree on me open terms." Farnsworth Law Review at 256.

Wn. App. 865, 871-72, 850 P.2d 1357 (1993). Under the principles established in *Berg v. Hudesman,* 115 Wn.2d 657, 667, 801 P.2d 222 (1990), these intentions must be ascertained by examining the writings between the contracting parties in the context in which they were negotiated, including surrounding circumstances, statements made, conduct prior and subsequent to the consummation of the alleged contract and course of dealing between the parties.

In this case, after the completion of an extensive marketing program to sell its building, characterized by Xerox as a "funneling process", at a meeting held on March 30, 2001, Xerox decided to negotiate terms for the acquisition of its building exclusively with Keystone in accordance with specific instructions conveyed to its authorized real estate brokers. ER 111; 54-55; 91-92. This culminated in the exchange of a series of letters between the parties with Keystone signaling on April 6th that it was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement." ER 16. In response, Xerox directed its brokers to communicate to Keystone that it was correspondingly "prepared to negotiate a Purchase and Sale Agreement", which it unequivocally committed on April 10th to "immediately draft ... for review and execution." ER 17. Keystone finally [p.34] accepted Xerox's proposed terms on April 13th. ER 18. Because Xerox had insisted that closing "occur on or before June 22,2001", which only allowed seventy days to complete the inspection, financing and closing of the transaction, both sides recognized the urgency of proceeding expeditiously in accordance with the agreed-upon terms.

b. Comprehensive Terms in Letters Forming Contract.

(The Appendix hereto contains a copy of the five letters forming the contract between Keystone and Xerox.)

More explicit than a mere commitment to negotiate terms of sale, Xerox unequivocally and absolutely committed "immediately to draft the Purchase and Sale Agreement for review and execution" by the parties. ER 17. The parties had already contemplated that the preparation of such an agreement would take no more than thirty days to finalize. ER 12.

The terms of sale, as established in the letters negotiated between Keystone and Xerox, were both comprehensive in nature and definitely established. They described the real estate by building name, physical address and square footage. ER 9-10. The purchase price was fixed at $3,505,000. ER 16. An earnest money deposit in the amount of $50,000 was specified, which became non-fundable upon Keystone's removal of its contingencies. ER 18;10. As indicated, Xerox insisted that closing must occur "on or before [p.35] June 22, 2001." ER 18. The financial responsibility for the payment of all closing costs was specifically allocated between Xerox and Keystone. ER 13. Definite provisions for the proration of taxes, utilities; service contracts and lease payments were included. ER 13-14. As of closing Keystone was entitled to have unrestricted possession of the property. ER 14. In the event of material damage or destruction of the property prior to closing, Keystone had the option to either proceed to closing with the benefit of any available insurance proceeds or terminate the transaction. ER 14. Xerox committed to provide a preliminary commitment for title insurance issued by Pacific Northwest Title Company "for review as soon as possible", as well as a title insurance policy at closing subject to such title exceptions as Keystone reasonably approved. ER 10. Xerox specifically agreed to provide Keystone an extensive

list of due diligence documents, including leases, maintenance and service contracts, insurance policies, plans and specifications, surveys and engineering reports. ER 11. Xerox affirmatively warranted that the property complied with applicable laws and did not contain any material defects. ER 11. Keystone and its agents were allowed access to the building to conduct any inspections and tests they deemed advisable. ER 12. As is customary in transactions of this nature, Keystone was also provided a period of thirty days from the execution of the purchase and sale agreement to [p.36] remove its inspection contingencies. ER 12. Finally, Xerox agreed to lease the building from Keystone for a period of seven years, with a five year option to renew, at the initial lease rate of $15.00 per square foot calculated net of operating expenses, "with annual increases equal to $1.00 per foot for the term of the lease." ER 12. The actual form of the lease document itself, the CIBA NNN Lease Form, which is a standard document generally used in commercial real estate transactions in metropolitan Seattle, was even specified and incorporated by reference. ER 12; 22.

Although not in the format of a typical real estate purchase and sale agreement, the agreed-upon terms nevertheless represented a complete and definite expression of all the essential terms necessary for the completion of the sale of the building. In fact, a commercial escrow officer with twenty-five years of experience has confirmed that the letters contain terms sufficiently definitive and comprehensive to permit the completion of closing based on these documents alone. ER 35-36.

The extent to which Xerox and Keystone had negotiated the finalization of all the essential, and even administrative and ministerial, terms of the sale in itself provides compelling confirmation that they had obligated themselves to proceed

with the transaction by at least drafting the purchase [p.37] and sale agreement and negotiating as promised.[8] However, probably more significant under the circumstances of this case is the term which was *omitted:* i.e., a provision confirming that Keystone and Xerox intended their commitments to be non-binding, which is customary if negotiating parties really intend for their undertakings to be without legal significance. ER 2; 90; 115-116. *See also, Evans, Inc. v. Tiffany & Co., supra* at 239 (after observing that "custom and usage in the real estate business" typically requires the inclusion of non-binding language, the court concluded: "If the letter was intended to describe the state of non-binding preliminary negotiations, it would customarily contain an express disclaimer stating that the parties do not intend to be bound until a more formal document is completed and executed.")

c. Conduct Subsequent to Concluding Agreement.

After Keystone and Xerox reached agreement, they both proceeded to do exactly what they said they would do. Xerox delivered due diligence documents to Keystone and hired an attorney to prepare the promised purchase and sale agreement. In fact, the attorney had actually almost [p.38] completed the initial draft of the document when Xerox abruptly abandoned

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[8] Farnsworth commented as follows regarding the importance of evaluating how far the parties have gone towards reaching agreement on the material terms of the transaction: "Courts show particular concern with the extent to which the terms are spelled out. Even though a writing may not be so indefinite as to be unenforceable, indefiniteness... may suggest that the parties did not intend to be bound until a final agreement was executed." Farnsworth Law Review at 266.

the negotiations. ER 56; 57; 83. Likewise, Keystone commenced its promised performance by reviewing documents, inspecting the property and arranging the financing necessary to complete closing by the specified closing date. ER 4-5. Everything was proceeding smoothly until April 25th, the date Xerox received a revised proposal from the City of Tukwila to purchase the building for $500,000 more than provided in the contract with Keystone. ER 94; 7; 31-33.

Importantly, Xerox does not question the fact that all material terms of the proposed sale had been decided through negotiations. It simply believes it had the right to unilaterally withdraw from further negotiations by refusing with impunity to prepare the purchase and sale agreement it affirmatively committed to draft. The very fact that Xerox had turned the deal over to its attorney to "write up" provides powerful independent confirmation that negotiations between the parties had been concluded.[9] In considering the significance of the engagement of attorneys as a [p.39] manifestation of intent to be bound to continue good faith negotiations towards a final agreement, Professor Eisenberg has commented as follows: "[An implicit agreement to negotiate] is especially likely to be true where the point of the further-document-to-follow

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[9] Jack Bradford, Xerox's manager primarily responsible for the sale of its Tukwila facility, confirmed in a deposition that business negotiations between Xerox and Keystone had been completed; consequently, the transaction had been forwarded to Xerox's attorneys. Speaking of his attorney at this stage in the sale process, Bradford confirmed that: "She gets involved at the - when all the business terms have been completely negotiated and we start a Purchase and Sale Agreement, is when the attorney gets involved." ER 51.

provision was to turn the matter over to the parties' lawyers. *When a deal is turned over by business persons to lawyers, the lawyers are expected to wrap up the deal, not to renegotiate the settled terms."*

Eisenberg at 1810. (emphasis added).

d. Validating Statements by Xerox.

Xerox has expressly acknowledged it actually had consummated an agreement with Keystone, albeit a "gentleman's agreement". ER 79-80. In describing the status of its dealings with Keystone in its Motion for Summary Judgment, Xerox even conceded that it had "notified Keystone that *Xerox was satisfied with the principle deal points of Keystone's offer, and would proceed to negotiate and draft a binding Purchase and Sale Agreement."* Memorandum Supporting Xerox's Motion for Summary Judgment. ER 95. (emphasis added).

Further confirmation was definitively provided when Xerox was advised by its brokers that Keystone had accepted its proposed revisions to the deal's terms, Xerox's representative specifically confirmed that he was [p.40] satisfied with the mutually agreed upon terms and prepared to proceed to move ahead with its closing. Any doubt or confusion regarding Xerox's position when the negotiations with Keystone concluded is certainly resolved by the following sworn testimony of Jack Bradford, Xerox's manager primarily responsible for the sale of the building:

> Q. When Keystone signed the acknowledgment on April 13th - and I think we saw an E-mail earlier when you say hey, that's great - at that point did

you personally have any reservations about the deal that had been struck?

A. No, not at that point.

Q. Did you think it was a good deal for Xerox?

A. No. I didn't think it was a good deal for Xerox.

Q. And why do you say that?

A. Well, because I thought the property was worth more money than three-five or whatever it was, *but it was the deal that we agreed to.* I thought there was still more money on the table. *But once we - once we said we were going to go with it, I said, "Yeah. That's great. Let's - Let's do it."*

ER 52-53. (emphasis added).

Based on the terms of the contract documents, the context surrounding the negotiations, the conduct of the parties and Xerox's explicit confirmatory statements, it's hard to conceive of a more compelling case for the existence of a legally enforceable "duty to go forward" with the transaction. Keystone and Xerox had unconditionally committed to move [p.41] forward with the preparation of the formal purchase and sale document, a step in the process which would have been completed but for the unfortunate intervention of the City of Tukwila. Clearly, as formulated by Professor Knapp as the underlying rationale for obligating parties to continue negotiating in good faith, both sides had reached the stage of the transaction where they had "expressed both satisfaction with and commitment to the essential terms of the proposed transaction, to the extent that each would reasonably regard

the other as unjustified in withdrawing." As a result, Xerox could abandon the deal with Keystone only if there was "a failure-after negotiation in good faith-to arrive at a complete and final agreement."

Knapp at 720.

2. Xerox's Refusal to Prepare the Purchase and Sale Agreement and Negotiate Its Terms Constituted Bad Faith.

Xerox's failure to "proceed immediately to draft the Purchase and Sale Agreement for review and execution" by the parties constituted an independent and blatant breach of its contract with Keystone. Although Xerox unconditionally committed to prepare the "underlying substantive agreement" which would have more perfectly formalized its commitment to sell the building to Keystone, it elected to disregard its obligation to do so. *See, American Cyanamid Co. v. Elizabeth Arden Sales Corp., supra* at 606- [p.42] 607 (commenting on the failure to prepare a purchase and sale agreement specifically contemplated by a detailed letter of intent, the court concluded: "surely [the agreement] would not normally permit the other contracting party simply to do nothing and defeat the drafting of any purchase agreement at all"); *Copeland v. Baskin Robbins, U.S.A., supra* at 881-882 (in discussing *Beck v. American Health Group,* 211 Cal. App. 3d 1555, 260 Cal Rptr. 237 (1989), the court concluded that it would have been a clear breach of contract if "the defendant in *Beck* did not present plaintiff with a draft contract and an opportunity to negotiate its terms as promised in its letter").

In addition, a separate and distinct breach occurred when Xerox abandoned its deal with Keystone, refusing in the process to negotiate further the terms of the purchase and sale

agreement. Because all the essential provisions relating to the sale had already been agreed upon, any efforts to negotiate the administrative and ministerial details of the formal contract would certainly have been fruitful, assuming of course the parties were proceeding in good faith. Clearly, Xerox was not.

Xerox's motivation in renouncing its commitment to sell to Keystone was pure greed measured by the additional $500,000 offered by the City of Tukwila. In discussing Xerox's "justification" for terminating its negotiations with Keystone, Xerox's Jack Bradford offered the following explanation in a [p.43] rather nonchalant but forthright manner: "There was a half-a-million dollars on the table. Why wouldn't I?" ER 61-62. The answer to this inquiry is both simple and straightforward: the law will not allow Xerox to disregard its unequivocal commitment to "draft the Purchase and Sale Agreement for review and execution" and to negotiate its terms in good faith. As confirmed by Knapp in his seminal article on good faith negotiations: "Withdrawal merely because a better offer has been received from a third party ... seems the most obvious case of bad faith." Knapp at 721. *See also, Farnsworth on Contracts,* §3.26c at 380-81 ("Whatever one's definition of unfair dealing in the context of obstructing agreement, a refusal to negotiate where there is an obligation to do so plainly amounts to a breach of the agreement")[10]; Eisenberg at 1807 ("In most cases, there is no

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[10] Farnsworth, at least in certain situations, appears to sanction "parallel negotiations" with an intervening third party. However, Farnsworth clarifies: "For a party who has made such an agreement [to negotiate] to abruptly terminate the negotiations, especially if they are advanced, by accepting a third party's offer without giving the other negotiating party an opportunity to respond to the offer would ordinarily amount to a breach of the duty of fair dealing."

real doubt about [what constitutes the breach of an agreement to negotiate], because the defendant clearly shows bad faith by negotiating with third parties, as in *Itek* and *Channel Home,* or by breaking off negotiations with no good reason").

[p.44]

3. As a Result of Xerox's Breach of Contract, Keystone is Entitled to Recover Its Expectation Damages to the Extent They Can Be Proven With Reasonable Certainty.

In Vestar Development II, the court refused to allow the recovery of expectation damages for the breach of an agreement to negotiate because they were too attenuated and speculative, especially because the letter of intent involved in the case did not even set forth the terms of the proposed sale. *Vestar Development II* at 962. The real estate developer in *Vestar* was attempting to recover $50 million in lost profits anticipated from the eventual development of a large shopping center, which was neither designed, financed, built nor occupied by tenants, based on its projected income from the lost investment opportunity. Similar to this case, General Dynamics refused to continue negotiating with Vestar following its receipt of a more attractive proposal for the sale of its land. However, the court concluded that there was no way for Vestar to establish its lost profits with the degree of certainty and forseeability required by contract law. *Id.*

Farnsworth on Contracts, §3.26c at 393. Xerox refused to even communicate to Keystone what its plans were, let alone to provide Keystone with the opportunity of responding to a better proposal or improving or clarifying the terms of the negotiated deal. ER 75-76.

In stark contrast, the terms of the sale of Xerox's building to Keystone had been firmly established with both precision and comprehensiveness. Most significantly relative to the calculation of Keystone's damages, Xerox's agreement to lease the building back from Keystone for seven years at fixed lease rates for the duration of its seven-year [p.45] term (calculated net of all operating expenses) provides Keystone with a template for calculating its lost profits, at least for the initial seven years of its investment, with mathematical exactness.[11] As a result, the contract enables Keystone to rather easily prove the benefit of the bargain damages caused by Xerox's breach of agreement to prepare the purchase and sale agreement and negotiate its terms in good faith.

Thus, Keystone is in an excellent position to firmly establish the lost profits caused by Xerox's breach of the agreement to endeavor to complete negotiations for the sale of its building. As a result, Keystone should clearly be entitled to recover "a sum which is the equivalent of performance of the bargain - the attempt to place [Keystone] in the position [it] would be in if the contract had been fulfilled." WPI 303.01, comment quoting from *Rathke v. Roberts,* 33 Wn.2d at 865. Because Keystone can "prove with reasonable certainty what profit [it] would have made had the contract

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[11] The relevant portion of the letters exchanged between Keystone and Xerox confirmed that the rental rate was fixed at: "$15.00 per [rentable square foot] ... net of any and all operating expenses (including land lease and parking lease payments), with annual increases equal to $1.00 per foot for the term of lease." ER 12. Thus, because both the square footage of the building (33,666) and the rate per square foot were established, Keystone can readily calculate the income stream projected for the investment for at least the initial seven years of its ownership.

been performed", Keystone should not be limited to any "*alternative* to the general benefit-of- [p.46] the-bargain measure of damages", such as reliance damages. *See,* comment to WPI 303.01.

Assuming "the court can determine what the economic benefit of the final contract would have been", the commentators clearly and consistently support the recovery of lost profits for breach of an agreement to negotiate in good faith. Burton and Andersen at §8.4.2, p. 364-65; *Farnsworth on Contracts,* §3.26b, p. 373-74; Eisenberg at 1809 (reliance damages appropriate only "if expectation damages are too uncertain"); Knapp at 723 ("In some cases, however, the main terms of performance, including quantity, quality and price, may have been so agreed upon by the time of breach that an expectation remedy can be computed with as much certainty as is usually required.") Furthermore, as previously noted, this Court has already specially authorized and approved the award of lost profits, together with all "consequential damages which flow from the breach", for the breach of an agreement to negotiate in good faith. See, *Family Medical,* 104 Wn.2d at 114.

Based on the above analysis and authorities, an aggrieved party such as Keystone should have the ability to attempt to receive full compensation for the damages sustained as a result of the breach of an agreement to prepare and negotiate the final purchase and sale agreement. Keystone should in the [p.47] process be expected to satisfy the same requirements, and be subject to the same limitations, as generally applicable to the breach of any other contract. No reason exists to differentiate between an action for the breach of an agreement to negotiate and any other breach of contract action. Although the long-standing requisites for proving damages, particularly forseeability and reasonable certainty, may result in

expectation damages being unavailable for the breach of many agreements to negotiate, they should nevertheless be recoverable if a plaintiff, such as Keystone in this case, can satisfy its burden of proof. The trier of fact in each case, based on the evidence produced at trial, is in the best position to determine the appropriate amount of damages the plaintiff can recover based on traditional principles of contract law.

As provided in *Tiegs v. Watts,* Keystone has the absolute right to present evidence to the trier of fact in order to establish its lost profits, which it has the right to recover to the extent such profits can be proven with the necessary degree of certainty. *Id.* 135 Wn.2d at 17. If a party can prove lost profits, as Keystone certainly believes it can in this case, it is entitled to recover them. No basis exists to artificially limit the remedy for Xerox's breach of contract to any alternative and inferior method of recovery, including reliance damages. In fact, reliance damages under Washington law can appropriately be considered as a measure of damages only if and when [p.48] expectation damages cannot be proven with reasonable certainty. *See, WPI* 303.01.

IV. CONCLUSION

It is self-evident that, lured by the additional $500,000 offered by the City of Tukwila, Xerox breached its contract to prepare the purchase and sale agreement with Keystone and negotiate its terms in good faith. Consistent with "the modern trend in contract law", as evidenced by the writings of all the recognized commentators and the weight of authority in other jurisdictions, supplemented by Washington case law which has addressed the question, this Court is requested to specifically confirm to the Ninth Circuit that Washington law specifically recognizes the enforceability of an agreement to negotiate a future contract. Further, based on the specific facts

of *Keystone v. Xerox,* this Court is asked to affirmatively indicate to the Ninth Circuit that this case represents a textbook example of negotiations which had advanced to the point where Washington law would impose on the parties an obligation to continue negotiating in good faith.

Finally, assuming a determination is made supporting the enforceability of agreements to negotiate, this Court is requested to confirm that all remedies generally available under established principles of contract law, including specifically the recovery of expectation damages determined

* * *

[p.49 omitted]

APPENDIX 3

**CERTIFICATION FROM
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT
IN**

No. 74904-3

KEYSTONE LAND & DEVELOPMENT CO.,
Appellant,

vs.

XEROX CORPORATION,
Appellee.

(Ninth Cir. Court of Appeals No. 02-35847)

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[pp.1-2 omitted]

* * *

[p.3]

disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed. *Id.* At 18328.

According to the Ninth Circuit, "older Washington precedents discourage a conclusion that there can be a contract to negotiate," but more recent cases suggest that, within an existing contract, there may be an enforceable provision obligating the parties to negotiate further agreements in good faith. *Id.* At 18327. The Washington cases, and what the Ninth Circuit terms a "modern trend" to enforce contracts to negotiate in appropriate cases, create uncertainty as to whether Washington law would recognize and enforce a preliminary agreement to negotiate under the circumstances of this case - where there is no underlying substantive contact. *Id.* At 18325-28. Because resolution of this issue - and the issue of what damages are available for breach - will have far-reaching effects on Washington contract law, the Ninth Circuit has certified those questions to this Court. *Id.* at 18328.

Xerox accepts the Ninth Circuit's summary of facts, which is repeated verbatim in Keystone's Statement of the Case.

SUMMARY OF ARGUMENT

Under current Washington law, preliminary agreements to negotiate are not enforceable. Every Washington court to address the issue has stated that a preliminary agreement or

promise to negotiate a future contract cannot give rise to any contractual duty. The cases Keystone relies on are inapposite. None of them purports to enforce a

* * *

[pp.4-14 omitted]

[p.15]

Judge Posner, though bound by the Seventh Circuit's previous opinion in the same case that preliminary agreements are enforceable under Illinois law, questioned the wisdom of that rule. Judge Posner noted "powerful arguments" that such undertakings are too vague, "shaky foundations" underlying the legal theory, unanswered questions about the duty's scope, and risks that parties will use the duty to negotiate to enforce nonbinding preliminary agreements, *Id.* at 276-80. Judge Posner also cast doubt on the long line of federal decisions holding that Illinois would recognize and enforce preliminary agreements to negotiate, *Id.* at 277-78. If there ever was a trend to enforce preliminary agreements to negotiate, *Venture II* may signal its impending demise.

B. The Few Jurisdictions that Enforce Preliminary Agreements to Negotiate Would Not Enforce the Alleged Agreement Here.

In any event, the few jurisdictions that enforce preliminary agreements to negotiate would not do so in this case.

In addition to identifying the jurisdictions that have - and expressly have not - recognized preliminary agreements to negotiate, Appendix C states whether or not the court found a preliminary agreement to negotiate in each case. Appendix C also summarizes the relevant provisions and performance

that led each court to its conclusion, and describes the result and reasoning.

Appendix C reflects two different types of cases in which courts have found enforceable agreements to negotiate: (1) cases in which the [p.16] parties agreed to be bound to the underlying substantive transaction, but left terms open for future negotiation; and (2) cases in which the parties agreed to be bound to specific standards of negotiating conduct. Keystone's claim in this case manifests neither of those patterns. Nor does it satisfy the underlying theoretical basis for enforcing preliminary agreements to negotiate - that such an agreement is an independent, stand-alone contract, enforceable without regard to the underlying incomplete substantive contract. And finally, the alleged agreement to negotiate in this case fails to satisfy the most basic requirement for enforcement- an expressed intent to be bound.

1. This Is Not a Case Where the Parties Agreed to Be Bound to the Underlying Substantive Transaction, But Left Terms Open for Future Negotiation.

One of the most important leading cases regarding enforcement of preliminary agreements to negotiate is *Teachers Ins. & Annuity Ass'n v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987) *("Tribune")*. In *Tribune,* a prospective borrower had accepted the lender's commitment letter stating that upon execution it "shall become a binding agreement" to borrow and lend. *Id.* at 491, 494. Upon reviewing the letter, the borrower was concerned by the "binding agreement" language, but chose to accept it rather than risk losing the commitment, *Id.* at 494. Although the final contract was subject to satisfactory closing documents and approval by borrower's board of directors, the court held that the parties

had reached a "binding preliminary commitment" - that is, a "*mutual commitment to a* [p.17]*contract* on agreed major terms, while recognizing the existence of open terms that remain to be negotiated." *Id.* at 498 [emphasis added]. In other words, the parties have agreed to "bind themselves to a concededly incomplete agreement." *Id.* When there is a "binding preliminary commitment," the parties undertake to negotiate the open terms in good faith toward a final contract that incorporates the commitment terms, *Id.*

Many of the leading cases that enforce preliminary agreements to negotiate are "binding preliminary commitment" cases. The parties had a duty to negotiate open terms in good faith because they had expressly bound themselves to the incomplete substantive contract. *E.g., Itek Corp. v. Chicago Aerial Indus., Inc.,* 248 A.2d 625 (Del. 1968) (applying Illinois law); *Evans, Inc. v. Tiffany & Co.,* 416 F. Supp. 224 (N.D. I11. 1976) (Ill. law); *see also Copeland v. Baskin Robbins U.S.A.,* 96 Cal. App. 4th 1251, 1253-55 (2002) (under California law, duty to negotiate flowed from fully executed, partly performed, written contract, but claim failed for lack of reliance damages).[8]

The Fourth Circuit recently characterized "preliminary binding commitments" as "firm binding commitments which, notwithstanding a need for more detailed documentation of agreement, can bind the parties to adhere in good faith to *the deal that has been agreed." Burbach Broad. Co. v. Elkins Radio Corp.,* 278 F.3d 401,407 (4th Cir. 2002) [emphasis[p.18] added]. The court remanded the case for determination whether a detailed letter agreement, which stated that sellers and buyers, "intending to be legally bound,

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[8] Appendix C describes these cases in more detail.

hereby agree to the contemplated transaction based on the following terms and conditions," was enforceable under the *Tribune* analysis, and whether West Virginia law would recognize such an agreement. *Id.* at 404, 406-09.

Conversely, under the *Tribune* approach, when the parties do not expressly commit themselves to the underlying transaction, they also do not undertake any contractual obligation to negotiate in good faith. *E.g., Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69 (2nd Cir. 1989) (applying N.Y. law); *Ogden Martin Sys., Inc. v. Tri-Continental Leasing Corp.*, 734 F. Supp. 1057, 1067 (S.D.N.Y. 1990) (applying N.Y. law). "A writing which anticipates execution of a final contract and which lacks an express statement that it is to be a binding contract is unenforceable" as either a contract in itself *or as a preliminary agreement to negotiate. Ogden Martin,* 734 F. Supp. at 1067 (explaining *Arcadian).* As a result, without a commitment to the underlying transaction, whatever language the parties used to describe their anticipated negotiations would be insufficient to create an enforceable agreement to negotiate under *Tribune's* "binding preliminary commitment" theory.

For example, the *Ogden Martin* court refused to find an agreement to negotiate based on multiple signed writings stating that the parties' commitment was conditioned on satisfactory documentation of the [p.19] contract, and "we look forward to completing this transaction with you in an expedited and professional manner." 734 F. Supp. at 1062-64. The lack of any express statement that the parties intended their preliminary correspondence to create a binding agreement to the underlying transaction was dispositive, *Id.* at 1067-68.

Likewise, in *Arcadian,* a signed memorandum of understanding provided that a "service and supply agreement will be negotiated," a "binding sales agreement will be completed," and the parties agree to "cooperate fully and work judiciously" to expedite closing and consummate sale. 884 F.2d at 70-71. But the lack of an express binding commitment to the underlying transaction negated any preliminary agreement to negotiate. *Id.* at 72.

The language that Keystone alleges created an agreement to negotiate is very similar to the *Ogden Martin* language, and not nearly so definite or promissory as the *Arcadian* language. The four letters that Keystone seeks to enforce as a preliminary agreement to negotiate represent the sum total of the parties' correspondence about the proposed transaction SER54. Keystone's initial letter, which made the transaction. "subject to" the parties' execution of "a binding Purchase and Sale Agreement" (ER 9) concluded, "we look forward to the possibility of completing a Purchase and Sale Agreement" (ER 15). In a later letter, Keystone stated that it was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement." ER 16. Xerox [p.20] responded that it was "prepared to negotiate a Purchase and Sale Agreement," and if certain terms were acceptable to Keystone, "we can then proceed immediately to draft the Purchase and Sale Agreement for review and execution."

The Ninth Circuit has already decided that Keystone and Xerox did not intend to commit themselves to buy or sell the Xerox building as a result of their preliminary correspondence. Opinion at 18314-317. In other words, they did not have a "binding preliminary commitment" to the underlying transaction, as that term is defined in *Tribune.* Under *Arcadian and Ogden Martin,* the lack of an express

binding commitment to the underlying transaction negated any preliminary agreement to negotiate.

Indeed, *Keystone's litany of alleged commitments in the correspondence* (Keystone Brief at 34-36) is *patently false*. Each of the asserted "commitments" - including Keystone's $50,000 earnest money deposit, which of course Keystone never paid - was expressly contingent on "execution" of a "binding Purchase and Sale Agreement." ER 9, 11-12, 17. Thus, there was no commitment to the terms stated in the correspondence; all terms were "open." *Venture II,* 96 F.3d at 279 (agreement "in principal" does not limit terms of final contract; all terms remain open and may be renegotiated).[9]

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[9] Both parties understood that even if they completed the transaction, the terms stated in the March 8 offer would not necessarily be incorporated into their Purchase and Sale Agreement. There had not been extensive negotiations between the parties about the deal terms. *See* EP, 9-18, 93. Focusing only on the "key deal points" Xerox's brokers had requested prospective buyers to address in their call for offers, neither Xerox nor its counsel had even reviewed all the terms proposed by Keystone in the parties' correspondence. SER 39; SER 63 (¶¶ 17-18). And some of those terms were "inadequate or unacceptable." *Id.* (¶ 18). Keystone, or at least its broker, also understood that the terms stated in the parties' correspondence were not set in stone. SER 53. For example, even after the exchange of letters upon which Keystone relies, Keystone's broker, Paul Sweeney, did not know whether Xerox would accept the lease form proposed by Keystone or any of its individual terms. SER 27-30.

[p.21]

2. This Is Not a Case Where the Parties Agreed to Be Bound to Specific Standards of Negotiating Conduct.

The other situation in which courts recognize and enforce preliminary agreements to negotiate occurs when the parties have agreed to be bound by specific standards of negotiating conduct. For example, Keystone relies on *Channel Home Centers v. Grossman,* 795 F.2d 291 (3rd Cir. 1986), a commercial leasing case applying Pennsylvania law. In that case, a fully executed letter of intent required the landlord to "withdraw the Store from the rental market, and only negotiate the above described leasing transaction to completion." *Id.* at 293. The court held that a preliminary agreement to negotiate is enforceable when the parties manifest a mutual intent to be bound to negotiating standards that are sufficiently definite to enforce. *Id.* at 299. Enforcement, then, is strictly limited to the express negotiating obligations set forth in the agreement. *E.g.,A/S Apothekernes v. I.M.C. Chem. Group,* 873 F.2d 155, 158-60 (7th Cir. 1989) (applying Illinois law).

[p.22]

Applying this test, a promise to use best effort to finalize the contract, or engage in good faith negotiations may not be specific enough to enforce. Keystone cites *Thompson v. Liquichimica of America, Inc.,* 481 F. Supp. 365 (S.D.N.Y. 1979), for the proposition that a preliminary agreement to use best efforts is enforceable. But later cases overrule that holding. For example, in *Jillcy Film Enterprises, Inc. v. Home Box Office, Inc.,* 593 F. Supp. 515, 520-21 (S.D.N.Y. 1984), the court summarized more recent New York law holding that

an agreement to use "best efforts" to reach a final contract is not specific and objective enough to enforce. *Id.* The *Jillcy* court relied on those cases to likewise hold that an agreement to "negotiate exclusively and in good faith" was too uncertain and vague to be enforceable, *Id.* at 516, 520-21.

In this case, there is no express reference to any standard of negotiating conduct at all. Xerox did not promise to negotiate exclusively with Keystone or withdraw the Xerox building from the market.[10] In fact, the parties' correspondence does not even mention "best efforts" or "good faith." Because the parties did not agree to be bound by specific standards of negotiating conduct, this case does not qualify for enforcement of the alleged preliminary agreement to negotiate.

[p.23]

3. There Was No Promise to Negotiate.

The rationale for making preliminary agreements about negotiating conduct enforceable is that they are discrete, stand-alone contracts, and as such they should be judged by the same standards as any other asserted contract. *See, e.g., Channel Home Centers v. Grossman,* 795 F.2d 291, 298-99 (3rd Cir. 1986). Thus, to be enforceable, a preliminary agreement to negotiate requires: (1) an "unequivocal promise;" (2) independent consideration; and (3) mutual

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[10] Keystone asserts that Xerox "decided" to negotiate exclusively with Keystone. Keystone Brief at 33. But Keystone has never contended nor presented any evidence that Xerox communicated this "decision" to Keystone, let alone made it the subject of a preliminary agreement, *Id.* And there is no reference to an exclusive dealing commitment in the Ninth Circuit's factual summary or decision. Order at 18322-324.

manifestations of an intent to be bound, *Id.* at 299-300; *see also USA Mach. Corp. v. CSC Ltd.*, 184 F.3d 257, 264 (3rd Cir. 1999) (distinguishing and explaining Channel).

There is no promise in this case. The alleged promise to negotiate and draft a Purchase and Sale Agreement is located in the April 10 letter from Xerox's brokers. The relevant portions of the letter are: "Xerox is prepared to negotiate a Purchase and Sale Agreement with Keystone ... subject to two modifications..."; and (if the modifications are acceptable), "We can then proceed immediately to draft the Purchase and Sale Agreement for review and execution." ER 18.

This is the language Keystone repeatedly calls as an "unequivocal and absolute commitment." *E.g.* Keystone Brief at 34. But it is not. It is, at most, an expression of intent. Clearly Xerox planned to negotiate further and planned to draft a Purchase and Sale Agreement for Keystone's review. But Xerox did not promise to do or not do anything. As the court stated in *Pacific Cascade Corp. v. Nimmer,* 25 Wn. App. 552, [p.24] 556, 608 P.2d 266, *rev. denied,* 93 Wn.2d 1030 (1980), "an intention to do a thing is not a promise to do it."[11]

The Massachusetts Supreme Court, in *Schwanbeck v. Federal-Mogul Corp.*, 592 N.E.2d 1289 (Mass. 1992), reversed a judgment for breach of an alleged preliminary

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[11] Keystone misleadingly claims that Jack Bradford, a Xerox employee who participated in the sale efforts, confirmed a "legally enforceable duty to go forward." Keystone Brief at 40. But Mr. Bradford's statement, was not made to anyone representing Keystone. *See* Order at 18323; SER 54. His "let's do it" statement is merely a quote from his deposition describing his attitude at the time. ER 52-53.

agreement to negotiate based on this precise principle. In *Schwanbeck,* a signed letter of intent provided that the parties would not be bound "until a definitive agreement is reduced to writing and executed." *Id.* at 1292. The letter of intent continued, "However, it is our intention, and we understand your intention immediately to proceed in good faith in the negotiation of such binding definitive agreement." *Id.* The court held that this language was merely an "expression of intent," and not a binding commitment, *Id.* Accordingly, there was no enforceable preliminary agreement to negotiate.

As in *Schwanbeek* there was no promise to negotiate here - only an expression of intent. As a result, the cases that recognize and enforce preliminary agreements to negotiate in other jurisdictions do not support Keystone's claim.

[p.25]

4. The Alleged Agreement to Negotiate in This Case Foils to Satisfy the Most Basic Requirement for Enforcement - an Express Intent to Be Bound.

Finally, the cases are unanimous that the most important element necessary to find an enforceable preliminary agreement to negotiate is a manifestation of the parties' mutual intent to be bound. For example, the *Tribune* court stated *(id.* at 497 [emphasis added]):

> A primary concern for courts in such disputes is to avoid trapping parties in surprise contractual obligations that they never intended ... Contractual liability ... arises from consent to be bound (or in any event from the manifestation of consent). It is fundamental to contract law that mere participation

> in negotiations and discussions does not create binding obligation, *even if agreement is reached on all disputed terms. More is needed than agreement on each detail, which is overall agreement* (or offer and acceptance) to enter into the binding contract.

As a result, the courts that recognize preliminary agreements to negotiate are particularly careful to avoid imposing liability where binding obligation was not intended, *Id.* at 499. There is a "strong presumption" *against* imposing any binding obligations when the preliminary agreement "expressly anticipates future preparation and execution of contract documents." *Id.*

In *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989), the Second Circuit explained how this presumption applies to an alleged preliminary agreement to negotiate. The court held that "a writing which anticipates execution of a final contract and which lacks an express statement that it is to be a binding contract is unenforceable" as either a contract in itself or as preliminary agreement to negotiate in [p.26] *good faith. Id.* [emphasis added]; *see also Ogden Martin Sys., Inc. v. Tri-Continental Leasing Corp.*, 734F. Supp. 1057, 1067 (S.D.N.Y. 1990) (explaining *Arcadian).*

Keystone claims that the "fundamental question for ultimate resolution in this case is whether the negotiations between Keystone and Xerox had advanced to the point where *the law should impose* on the parties a 'duty to go forward.'" Keystone Brief at 32 [emphasis added]. But the theory behind enforcing agreements to negotiate is that the parties have imposed the duty on themselves. Because there is no express binding commitment in the parties' correspondence here, the

law will not impose such a duty, regardless of how far negotiations had advanced. In other words, the extent and detail of the parties' proposed terms cannot negate their express mutual determination that contractual obligations would be "subject to" "execution by both parties" of a "binding Purchase and Sale Agreement." ER 9, 11-12.

Keystone also argues that if Xerox intended *not* to be bound to a preliminary agreement to negotiate, Xerox should have included language to that effect. Keystone Brief at 37. The *Ogden Martin* court expressly rejected this argument (id. at 1069 [emphasis in original]):

> According to Ogden, in an attempt to reverse the argument, TriCon's failure to draft a provision disclaiming an intent to be bound raises a negative inference that no disclaimer was intended. The *Arcadian* court, however, disposed of this issue because it accepted Judge Leval's reasoning in *Tribune* that: "There is a strong *presumption* against finding binding obligation in agreements which ... expressly anticipate future preparation and execution of [p.27] contract documents." [citations omitted, emphasis in original].
>
> In this case, Ogden did not insert a *Tribune-type* clause indicating an intent to be bound and TriCon did not disclaim any intent to be bound. Between the two, however, the presumption rests with an intent not to be bound.... Just as in *Arcadian, the* language contained in the writings fails to overcome the presumption not to be bound and, instead, indicates precisely otherwise.

Likewise, under Iowa law, a letter agreement disclaimer that binding obligations would await formal contract precluded binding preliminary agreement to negotiate in good faith. *Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421 (Sth Cir. 1991); cf., *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429 (7th Cir. 1993), *appeal after remand*, 96 F.3d 275 (7th Cir. 1996) (applying Illinois law, court recognized possible preliminary agreement to negotiate in good faith where parties *expressly* made duty to negotiate in good faith binding in an otherwise nonbinding letter of intent).

In short, when a preliminary writing contemplates the execution of a final, formal agreement, it is up to the party who wants a binding preliminary agreement to say so, and define the scope of the binding commitments. This Court should reject an enforceable preliminary agreement to negotiate under the circumstances of this case because the parties' correspondence did not make anything binding, and did not even mention the "good faith" that Keystone claims should have limited Xerox's freedom to withdraw from the Purchase and Sale Agreement negotiations.

[p.28]

C. Summary.

Keystone asks this Court to recognize and enforce a preliminary agreement to negotiate *without* a "binding preliminary commitment" to the underlying transaction, *without* an agreement to be bound to specific standards of negotiating conduct, *without* an independent stand-alone promise to negotiate, and *without* a specific statement that the parties intended to be bound to anything. Thus, Keystone's claim is not only leaps and bounds beyond any cause of action recognized - or even hinted at - by a Washington court, it also

represents a major leap beyond any preliminary agreement to negotiate enforced in any other jurisdiction. As a result, the Court should reject Keystone's negotiation claim.

[pp.29-50 omitted]

* * *

APPENDIX 4

CERTIFICATION FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN

No. 74904-3
[Received June 22, 2004]

KEYSTONE LAND & DEVELOPMENT CO.,
Appellant,

v.

XEROX CORPORATION,
Appellee.

(Court of Appeals No. 02-35847)

KEYSTONE'S MOTION FOR PERMISSION TO SUBMIT SUPPLEMENTAL BRIEFS

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I. PROCEDURAL BACKGROUND

This case is before the Court as a result of a certification order issued by the United States Court of Appeals for the Ninth Circuit requesting the Court's guidance as to the enforceability under Washington law of an agreement to negotiate a future contract. At oral arguments heard on May 11, 2004, Chief Justice Gerry L. Alexander expressed his concern as to whether the Ninth Circuit was actually requesting this Court to apply its interpretation of applicable Washington law to the specific facts of this case, thereby effectively deciding the merits of the dispute between the parties.

Based primarily on Chief Justice Alexander's questions, Keystone thereafter filed a Motion for Clarification of Certification Order with the Ninth Circuit. On June 17, 2004, the Ninth Circuit, in an order which partially granted and partially denied Keystone's Motion, further clarified the nature and extent of its submission to this Court. A copy of the Ninth Circuit's Order is attached hereto as Exhibit "A". Both Keystone and Xerox have previously provided this Court with a courtesy copy of the Motion and Response filed with the Ninth Circuit.

Essentially, after noting that "the issues may be reframed in a manner entirely agreeable to the Washington State Supreme Court", the order clarified that this Court can elect whether to: (i) apply its interpretation of Washington law to the specific facts of this case, thereby effectively deciding the outcome of this controversy; or (ii) "limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and enforceable, then [the Ninth Circuit] will apply that law in further proceedings in this appeal."

II. NEED FOR SUPPLEMENTAL BRIEFING

Considering the rather unique procedural history of this case, neither Keystone nor Xerox have had the opportunity to brief the question of whether this Court, in response to the Ninth Circuit's certification order, should properly limit its decision to the promulgation of Washington law relative to the enforceability of an agreement to negotiate, or whether it should actually dispose of this case, a case which is actually pending before another court. Based on the potentially dispositive nature of the Court's response to the diametrically opposed alternatives presented by the Ninth Circuit's June 17, 2004, order, further briefing appears to be appropriate under the circumstances, if not absolutely essential to the Court's formulation of a response to the certified questions. The troublesome nature of the implications of the Ninth Circuit's certification order was clearly acknowledged by Chief Justice Alexander at oral arguments.

Crucially, it cannot be emphasized too strongly that this case has never advanced beyond cross-motions for summary judgment filed with the federal district court, the granting of which in favor of Xerox was then appealed by Keystone to the Ninth Circuit. As a consequence, the significance of the facts surrounding the rather complex sale-leaseback transaction involved in this case, in particular the intended meaning of the terms contained in the relevant correspondence, has never been explored, let alone definitively established.

The compelling significance of this fact has been specifically emphasized by the Ninth Circuit in both the original certification order and, more recently, the clarification order. Consequently, in the event the Court's decision is limited to the general enforceability of an

agreement to negotiate, the Ninth Circuit has specifically indicated that it will simply reverse the summary judgment entered in Xerox's favor. In the Ninth Circuit's opinion, this case is not ripe for resolution through summary judgment. As decisively concluded by the Ninth Circuit:

> *"As we will explain if it is necessary, there are genuinely disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it. In this case, a trial will be necessary."*

Certification Order at 18328; 353 F. 3d 1093, 1098. (emphasis added).

During the course of oral arguments various justices questioned the meaning and significance of particular terms contained in the correspondence forming the written contract between Keystone and Xerox. Further, Xerox has asserted that the "undisputed facts" in this case are confined to the "brief written correspondence, which both parties agree constitutes the sum total of the parties' substantive communications on this issue." Xerox's Response in Opposition to Motion for Clarification, p. 1. However, although the terms contained in the letters exchanged between Xerox and Keystone are obviously of considerable importance, they represent only the starting point in the ascertainment of the intentions of the parties when they were exchanged. As appropriately observed by this Court in *Berg v. Hudesman,* 115 Wn.2d 657, 664, 801 P.2d 222 (1990), quoting from both Corbin and Williston:

> "[I]t can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances ... Holmes was more poetic: 'A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used'."

Recognizing that words alone are fragile vessels within which to convey ideas, Washington law requires the intent of contracting parties to be determined under the so-called "context rule", which necessitates the evaluation of the terms of the contract considering "the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Berg v. Hudesman, supra* at 667. The intentions of Xerox and Keystone, based on their objective manifestations, must therefore be initially determined and then evaluated in the context of all the circumstances surrounding their negotiations. This process necessitates an inquiry into the parties' discussions and actions before, during and after they completed agreement on the terms of the sale-leaseback transaction involved in this litigation.

The inherent complexity of this evaluation is clearly highlighted by the parties' disparate positions regarding the significance of the formal Purchase and Sale Agreement, which was contemplated by both sides to promptly follow their expression of agreement on all the material terms for the sale of the building. Xerox, on the one hand, argues that the

anticipation of such an agreement precludes the determination that the parties intended to enter into an enforceable contract to negotiate. Xerox's Response in Opposition to Motion for Clarification, p. 1-2. Keystone, conversely, argues that Xerox was obligated, in fulfillment of its specific commitment to "proceed immediately to draft the Purchase and Sale Agreement for review and execution" of the parties, to deliver this document as the initial step in performing under its agreement to negotiate. Keystone's Motion for Clarification of Certification Order, p. 6.

III. REQUEST FOR PERMISSION TO SUBMIT SUPPLEMENTAL BRIEFS

Pursuant to Rule 10.1(h) of the Rules of Appellate Procedure, Keystone respectfully requests this Court to authorize the parties to submit additional briefing for the exclusive purpose of addressing whether this Court's decision should be limited to the general enforceability under Washington law of an agreement to negotiate, as opposed to this Court effectively deciding this case on a motion for summary judgment filed in federal court. Due to the targeted nature of the issue and the extensive briefing completed to date, it would be appropriate for both the briefing schedule to be expedited and the length of the briefs to be restricted to eight (8) pages for the brief and response and four (4) pages for any reply deemed necessary. No more that two weeks should be necessary to complete the requested briefing process.

Assuming the Court is inclined to approve the enforcement of at least certain agreements to negotiate, Keystone believes that a jury trial before the federal district court is essential in order for the parties' intentions to enter into such an agreement to be fully explained and established. This result,

Keystone further submits, is mandated by the context rule established in *Berg v. Hudesman.*

As indicated, the necessity for all disputed factual issues to be resolved at trial has already been established in the Ninth Circuit's orders. If the federal court in which the case is pending would unquestionably require all "genuinely disputed material facts", which it specifically recognized existed in this case, to be decided at trial, additional briefing is required to fully explore the appropriateness or advisability of this Court, in effect, deciding these factual issues through summary judgment. In other words, how can this Court dispose of this case on a summary judgment motion when the federal court responsible for it has already indicated that it would refuse to do so?

RESPECTFULLY SUBMITTED this, 21st day of June, 2004.

INSLEE, BEST, DOEZIE & RYDER, P.S.

/s/_____

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**CERTIFICATION FROM
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT
IN**

**No. 74904-3
[Received June 28, 2004]**

KEYSTONE LAND & DEVELOPMENT CO., Appellant,	)
vs.	)
XEROX CORPORATION, Appellee.	)

(Ninth Cir. Court of Appeals No. 02-35847)

XEROX RESPONSE TO MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL BRIEFS

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SUPPLEMENTAL BRIEFS

Xerox opposes Keystone's Motion for Permission to Submit Supplemental Briefs. First, Keystone's Motion mischaracterizes the Ninth Circuit's Certification and Clarification Orders. Second, Keystone misrepresents the need for an evidentiary hearing to establish the "circumstances of this case." And third, this Court's broad discretion when deciding certified issues is clear and requires no additional briefing.

A. KEYSTONE MISCHARACTERIZES THE NINTH CIRCUIT'S CERTIFICATION AND CLARIFICATION ORDERS.

The Ninth Circuit affirmed summary judgment dismissal of Keystone's claim for breach of an alleged contract for purchase and sale of the Xerox building. The only claim remaining in this case is Keystone's claim for breach of an alleged contract to negotiate the purchase and sale agreement, which Xerox denies. As to this remaining claim, the Ninth Circuit has set forth the relevant "circumstances of this case" in its Certification Order and Opinion. *See* Certification Order at 18322-24 (353 F.3d at 1094-95); Opinion at 18311-13 (353 F.3d 1070, 1072-73).

In its Motion, Keystone egregiously mischaracterizes the Ninth Circuit's certification and clarification orders. The Ninth Circuit has stated- twice- that its disposition depends on whether Washington does or does not "recognize a contract to negotiate *in this case.*" Certification Order at 18328 (353 F.3d 1093, 1098); Clarification Order at 1 [emphasis added]. Other statements in the Ninth Circuit Orders confirm its request for guidance by this Court as to whether an alleged agreement to negotiate a future contract is enforceable *"under the*

circumstances presented in this case," as opposed to whether a contract to negotiate is ever enforceable. Certification Order at 18329 (353 F.3d at 1098) [emphasis added]. [1] The Ninth Circuit will not reverse the District Court summary judgment based on this Court's opinion unless this Court indicates that an agreement to negotiate is enforceable *in this case.* Certification Order at 18328 (353 F.3d 1093, 1098); Clarification Order at 1.

Thus, Keystone's statements that (1) the Ninth Circuit will reverse summary judgment for Xerox if this Court holds that agreements to negotiate may be enforceable generally, and (2) the Ninth Circuit believes this case is not ripe for resolution on summary judgment (Motion at 3-4), are blatantly false. The premise for Keystone's Motion - that the Ninth Circuit has indicated that it would refuse to do what it is asking this Court to do (Motion at 8) - is simply wrong.

Rather, in response to Keystone's Motion for Clarification of Certification Order, the Ninth Circuit specifically reiterated that it will make its own determination whether or not Washington law would recognize an enforceable agreement to negotiate under the circumstances of this case, if this Court declines to answer that question. The Ninth Circuit stated (Clarification Order at 3):

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[1] See also Certification Order at 18328 (353 F.3d at 1098), Clarification Order at 2 ("if such a contract is recognized *in this type of case*...."); Certification Order at 18322 (353 F.3d at 1094) ("whether Washington law may recognize a contract to negotiate *in the circumstances presented by this appeal");* Certification Order at 18325 (353 F.3d at 1096) ("whether a contract to negotiate can be enforceable *in the circumstances presented in this case");* [emphasis added throughout].

> If the Washington State Supreme Court wants to answer the question as we certified it, it will be dispositive of this appeal. Conversely, if the Washington State Supreme Court prefers to limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and enforceable, then *we will apply that law in further proceedings in this appeal.*

In other words, contrary to Keystone's argument, the Ninth Circuit views the question whether an alleged contract to negotiate can be enforceable under the circumstances presented in this case as a question ripe for resolution on summary judgment, which either this Court or the Ninth Circuit must resolve *"in this appeal."*

B. KEYSTONE MISREPRESENTS THE NEED FOR AN EVIDENTIARY HEARING TO ESTABLISH THE "CIRCUMSTANCES OF THIS CASE."

Neither *Berg* nor summary judgment principles should inhibit this Court from deciding whether or not an alleged agreement to negotiate a future contract can be enforced under the circumstances of this case.

In *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990), before addressing any contract interpretation principles at all, this Court distinguished between contract interpretation and contract construction. "Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person." *Id., quoting* 3 A. Corbin, *Contracts* § 532, at 2 (1960). In contrast, "[c]onstruction of a contract determines its legal effect;" it is the process by which legal consequences are determined to follow from the terms of the contract, its context, and

applicable legal policies. *Id., quoting* Patterson, The *Interpretation and Construction of Contracts,* 64 Colum. L. Rev. 833, 835 (1964).

The issue here - the one certified by the Ninth Circuit - is an issue of contract *construction:* what legal consequences, if any, can flow from the correspondence between Xerox and Keystone? As *Berg* directs, those consequences are determined as a matter of law, based on the parties' language, their situation, and relevant legal policies. Only if, as a matter of contract *construction,* the parties' correspondence *could* create an enforceable contract to negotiate, is there any reason to remand the case back to the District Court for contract *interpretation* - to determine whether, as a matter of mutual intent trader the *Berg* context role, the parties *did* create such a contract. Thus, the *Berg* factual interpretation issues raised by Keystone have nothing to do with the certified question.[2]

The fact that this case comes to this Court on appeal from summary judgment is, likewise, no impediment to determining whether or not Washington law would recognize an enforceable contract to negotiate under the circumstances of this case.

The purpose of summary judgment is to determine the legal sufficiency of factual assertions, and avoid useless trials.

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[2] Moreover, although Keystone argues that the *Berg* interpretation analysis would require an inquiry into "the parties' discussions and actions before, during and after" their exchange of correspondence, it is undisputed that the only discussions occurred through the parties' brokers, and the only negotiations were the four letters that Keystone claims created the agreement. Certification Order at 18323 (353 F.3d at 1095); ER 9-18, 93.

City *of Seattle v. State,* 136 Wn.2d 693, 697, 965 P.2d 619 (1998); *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 951, 421 P.2d 674 (1966). Both Xerox and Keystone moved for summary judgment on the negotiation issue. The Ninth Circuit Certification Order and Opinion recount the undisputed facts of the parties' brief correspondence, as established on summary judgment. Certification Order at 18322-24 (353 F.3d at 1094-95); Opinion at 1831113 (353 F.3d 1070, 1072-73).[3] The only question before this Court is to determine the "legal sufficiency" of those facts - "the circumstances of this case" - to constitute an enforceable contract under Washington law. If, as the District Court held, Washington law does not recognize the parties' correspondence as an enforceable contract to negotiate, summary judgment dismissing the negotiation claim will be affirmed. Certification Order at 18328 (353 F.3d at 1098); Clarification Order at 1-2.

Keystone's argument that, because this case is before the Court on summary judgment, the Court should restrict its opinion to whether a contract to negotiate can *ever* be enforceable is absurd. Contracts are enforceable as a general rule. But this does not preclude courts from determining on

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[3] Unfortunately, Keystone persists in misstating those facts, refusing to accept that summary judgment has already been entered and affirmed negating any contract to purchase and sell the Xerox building. For example, Keystone states that the parties "completed agreement on the terms of the sale-leaseback transaction involved in this litigation," and expressed "agreement on all the material terms for the sale of the building." Motion at 6. But it is the law of the case that the parties did ***not*** reach any agreement to purchase and sell the Xerox building; their correspondence only reflected an objective to make a future contract. Opinion at 18314-17 (353 F.3d at 1072-73).

summary judgment that a particular contract or type of contract is unenforceable under the circumstances of the particular case.

C. THIS COURT'S BROAD DISCRETION WHEN DECIDING CERTIFIED ISSUES IS CLEAR AND REQUIRES NO ADDITIONAL BRIEFING.

This Court's discretion in certification cases is well established. The Court has complete discretion to reframe, decline to answer, or limit its response to certified questions, but cannot address issues outside the scope of the certification. *Broad v. Mannesmann,* 141 Wn.2d 670, 676, 10 P.3d 371 (2000). Indeed, the Ninth Circuit specifically referenced *Broad* in the Certification Order. Certification Order at 18328, n.3, 18329 (353 F.3d at 1097, n.3, 1098); *see also* Clarification Order at 3.

In briefs totaling almost 125 pages, the parties have thoroughly addressed the important, but narrow, issue certified to this Court by the Ninth Circuit. Any additional briefing about whether or how this Court should limit its response to the certified questions would merely present an unnecessary opportunity for partisan lobbying for a scope of opinion viewed as advantageous to a particular party.

As previously discussed, the Ninth Circuit Orders make it clear that either this Court or the Ninth Circuit will determine whether or not Washington law recognizes an enforceable contract to negotiate under the circumstances of this case. Xerox respectfully submits that this Court has already received sufficient briefing to enable it to fully answer that question, or to exercise its informed discretion to reframe the question and answer it in a manner that will clarify Washington law for the Ninth Circuit in light of the "far-reaching effects" that the

decision in this case will have for "those who contract in, or are subject to, Washington law."

Certification Order at 18328 (353 F.3d at 1097). Keystone's Motion for Permission to Submit Supplemental Briefs should be denied.

DATED this 25th day of June, 2004.

GRAHAM & DUNN PC

By /s/_____

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CERTIFICATION FROM
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
IN

No. 74904-3
[Received July 7, 2004]

KEYSTONE LAND & DEVELOPMENT CO.,
Appellant,

v.

XEROX CORPORATION,
Appellee.

(Court of Appeals No. 02-35847)

REPLY TO XEROX'S RESPONSE TO KEYSTONE'S MOTION FOR PERMISSION TO SUBMIT SUPPLEMENTAL BRIEFS

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I. WHETHER XEROX AND KEYSTONE MANIFESTED AN INTENT TO FORM A CONTRACT TO NEGOTIATE IS THE CENTRAL ISSUE REMAINING IN THIS CASE

A. Evaluation of the Intentions of the Parties.

Whether technically characterized as "construction" or "interpretation" either a court or fact-finder must ultimately determine whether Xerox and Keystone manifested their mutual intentions to enter into a contract obligating them to continue in good faith negotiating a formal Purchase and Sale Agreement.[1] Under the context rule, "... the intent of the parties to a contract is to be determined by examining their objective manifestations, including both written agreements and the context within which those agreements were executed. The intent of the parties may also be discovered from the actual language of the agreement, as well as from the contract as a whole, the subject matter and the objective of the contract, all circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and

---

[1] Based on a review of the decided cases, the practical distinction between the "interpretation" and "construction" of a contract has been summarized as follows: "Yet, many cases have ignored the distinction entirely and used interpretation and construction interchangeably. As a result, Washington court decisions on this issue are inconsistent and clouded ... The practical use of distinguishing between interpretation and construction, however, may be limited. David K. DeWolf, Keller W. Allen and Darlene S. Barrier, 25 *Wash. Prac., Contract Law and Practice* §5.2 (1998).

the reasonableness of respective interpretations advocated by the parties." David K. DeWolf, Keller W. Allen and Darlene S. Barrier, 25 *Wash. Prac., Contract Law and Practice* §5.2 (1995) (2003 Pocket Part).

Xerox correctly asserts that the Ninth Circuit specifically affirmed the district court's conclusion that a contract had not been formed to buy and sell Xerox's building. This result was reached, however, only after the court carefully evaluated the language of the letters exchanged between Xerox and Keystone in the context of their discussions relating to the sale-leaseback transaction contemplated by the parties. Based largely on the fact that a formal Purchase and Sale Agreement was expected to be executed, supplemented by the fact that the letters were only executed by the parties' brokers, the court concluded that "[i]f preliminary letters between brokers, which refer only to an intent to enter a formal and binding Purchase and Sale Agreement, could effectuate a transfer of a multi-million dollar building, that would certainly be extraordinary." Opinion at 18316; 353 F. 3d 1070, 1074-75. Significantly, the Ninth Circuit specifically found that "there is no basis from this evidence for a rational jury to find that Keystone and Xerox had entered a contract to sell the building." Opinion at 18317; 353 F. 3d 1070, 1075.

Keystone accepts, as it must, that no contract was formed which obligated Xerox to sell its building. But, it must be clearly understood that the analysis of the parties' intent to "effectuate a transfer of a multi-million dollar building" is completely different from a determination as to whether the parties intended, by virtue of the letters understood in the context in which they were exchanged, to obligate themselves to continue negotiating towards a contract for such a sale. It is only this contract to negotiate, as alleged by Keystone and affirmed by the Ninth Circuit, which is involved in this case.

Xerox continues to fail to appreciate the significance, at this stage of the proceedings, of the fact that Xerox and Keystone had reached mutual agreement as to all the material terms of the sale-leaseback transaction involved in this case. Keystone certainly recognizes that the parties did not complete a legally enforceable agreement to sell the building based on the terms contained in the letters. However, in specific reference to the validity of the agreement to negotiate before this Court, the fact that all the material terms of the sale had been established is of critical importance because it both validates the parties' intentions to commit to proceed further with the negotiation process and provides a framework for a judge or jury to evaluate whether such negotiations are being conducted in good faith. As emphasized in Keystone's Reply Brief, cases from other jurisdictions which follow the "modern trend" in contract law by enforcing agreements to negotiate have refused to recognize a particular agreement to negotiate when the parties had not reached agreement as to the material terms of the transaction being negotiated. Reply of Keystone at 14-17.

B. The Intentions of the Parties Must be Established by the Trier of Fact, Rather Than Through Summary Judgment Proceedings.

Thus, the inquiry into the parties' intentions relating to the formation of an agreement to negotiate focuses on their respective intention to agree to continue with their negotiations, as opposed to their ultimate obligation to buy and sell the building. Although the intention of the parties to subsequently execute a formal Purchase and Sale Agreement was critical in the Ninth Circuit's determination that a binding contract to sell was not concluded, Keystone argues that Xerox's failure to "immediately draft the Purchase and Sale Agreement for review and execution", as it specifically promised, constitutes a clear breach of the contract to negotiate. Further, more

informality would be expected, such as negotiations being conducted through the principals' authorized agents, in an agreement to negotiate context, rather than the finalization of a commitment to sell. Similarly, Xerox's actual preparation of a draft of this document, which was almost finalized when Xerox abandoned the transaction, provides further confirmation that Xerox intended to commit itself to continue with the negotiation process.

As previously undertaken by the Ninth Circuit with respect to the contract to sell the building, the terms contained in the referenced letters must be evaluated in the context of the circumstances surrounding their execution in order for a court or jury to determine whether, based on their objective manifestations, Keystone and Xerox intended to enter into an agreement to negotiate. At this stage of the proceedings, in which only cross-motions for summary judgment are before the Court, neither this Court nor the Ninth Circuit can dispose of this case unless, considering all evidence most favorably to the non-moving party, there is no genuine issue as to any material fact and reasonable persons could only reach one conclusion from such undisputed evidence. *Meissner v. Simpson Timber* Co., 69 Wn.2d 949, 951, 421 P.2d 674 (1966).

If granted leave to submit additional briefing, Keystone will further clarify that the facts involved in this case relating to the significance of the parties' letters considered in the context under which they were exchanged raises important questions as to the intentions of the parties to form an agreement to negotiate. Although the Ninth Circuit specifically found, as it was required to do in order to grant summary judgment, that there was "no basis from this evidence for a rational jury to find that Keystone and Xerox had entered into a contract to sell the building", no such finding was considered as to the existence of an agreement to negotiate. Opinion at 18317; 353

F. 3d 1070, 1075. The Ninth Circuit actually never discussed the facts of this case in reference to the existence of an agreement to negotiate.

In fact, the Ninth Circuit has already concluded in its Certification Order, and reiterated in its Clarification Order, that, assuming this Court decides that Washington law recognizes the existence of a contract to negotiate, it would decline to resolve this case through summary judgment due to disputed issues of material facts. Xerox's contention that Keystone has somehow "mischaracterized" the court's orders on this important issue is most effectively answered by simply quoting the orders themselves:

> Conversely, if the Washington State Supreme Court decides to recognize a contract to negotiate in this case, *we will reverse the district court's order granting summary judgment to Xerox.* As we will explain if it is necessary, *there are genuinely disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, If such a contract is recognized in this type of case, Xerox breached it. In this case, a trial will be necessary.*

Clarifying Order at 1-2; Certification Order at 18328; 353 Fo 3d 1093, 1098 (emphasis added).

II. THE COURT SHOULD PROPERLY LIMIT THE SCOPE OF ITS OPINION TO THE PRONOUNCEMENT OF WASHINGTON LAW ON THE ENFORCE ABILITY OF AGREEMENTS TO NEGOTIATE

The Clarification Order clearly indicates that this Court, in this exercise of its considerable discretion, may elect to either apply Washington law to the facts of this case, thereby effectively deciding the outcome of this controversy, or "limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and enforceable." Clarification Order at 3. If the Court's opinion is confined to announcing Washington contract law on this important issue, the Ninth Circuit "then will apply that law in further proceedings in this appeal." *Id.*

As can be explained through supplemental briefing, Keystone believes that this Court should properly refuse to decide a case pending before a federal court by, in effect, deciding a motion for summary judgment submitted by either Keystone or Xerox. Based on the complexities inherent in determining the intentions of the parties based on the writings considered in light of the surrounding circumstances, Keystone has demonstrated that the parties' intentions relating to the formation of an agreement to negotiate has not been even explored. Clearly, more than one conclusion is possible as to the significance of the parties' words and actions.

Further briefing will also confirm that many Washington cases have held that, in order to properly determine the intentions of contracting parties, a trial is essential in order for the language of the contract to be considered under the context rule. Summary judgment, as a result, is usually an inappropriate procedure under any circumstances to determine

the intentions of the parties in complex commercial negotiations. See, *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App.1, 937 P.2d 1143 (1997) (summary judgment deemed inappropriate where documents support more than one interpretation of the parties' intentions at the time of contracting); *Swanson v. Liquid Air Corporation,* 118 Wn.2d 512, 826 P.2d 664 (1992) (summary judgment reversed because extrinsic evidence as to the meaning of an "at will" employment contract could support conflicting interpretations); *Bort v. Parker,* 110 Wn. App. 561, 42 P.3d 980 (2002) (considering the surrounding circumstances, the court determined that genuine issues of material fact existed as to whether a construction company was intended as a party to the contract; as a result, summary judgment was inappropriate); *Denny's Restaurants, Inc. v. Security Union Title Insurance Company,* 71 Wn. App. 194, 859 P.2d 619 (1993) (factual issue as to scope of a title insurance policy required trial to resolve ambiguity). Most compellingly, the Ninth Circuit has clearly indicated in its orders that, based on the "existence of genuinely disputed material facts" in this case, a trial wouldbe necessary in order for it to determine whether Xerox and Keystone intended to enter into a contract to negotiate, as well as whether Xerox's abandonment of the sale constituted a breach of this agreement.

III. CONCLUSION

Based on the foregoing considerations, Keystone believes that further briefing as to the proper scope of the Court's opinion would be helpful for the court to properly respond to the Ninth Circuit's orders.

RESPECTFULLY SUBMITTED this 2nd day of July, 2004.

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By:/s/_____

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(4)

No. 04-911

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In the Supreme Court of the United States

KEYSTONE LAND & DEVELOPMENT COMPANY,
Petitioner,

v.

XEROX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. THE CERTIFICATION PROCESS AS APPLIED IN THIS CASE IS IN CONFLICT WITH FEDERAL LAW REQUIRING A TRIAL TO RESOLVE DISPUTED FACTUAL ISSUES IN SUMMARY JUDGMENT PROCEEDINGS.

In deciding a motion for summary judgment the federal judge, after viewing all the evidence in the light most favorable to the nonmoving party, must determine whether there are any genuine issues of material fact. *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999). It is fundamental that in federal court if a rational trier of fact might possibly resolve the issue in favor of the nonmoving party, summary judgment must be denied. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630-31 (9th Cir. 1987). Only if the moving party satisfies its rather heavy burden of establishing that the undisputed facts of the case entitles it to judgment as a matter of law can summary judgment be appropriately granted. Accordingly, Xerox as the moving party in this summary judgment proceeding had the burden of proving that it was entitled to judgment as a matter of law based on the undisputed facts of the case.

Therefore, in order for Keystone to survive Xerox's motion for summary judgment in this case, Keystone need only present evidence from which a jury might possibly return a verdict in its favor. Importantly, the Court of Appeals has already determined that "there are genuinely disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it." Certification Order, App. E at 32a.

This Court in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958) long ago emphasized that:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

Byrd at 537.

In order to promote "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts," this Court in *Byrd* required the factual question of whether the plaintiff qualified as a "statutory employee" for workmens' compensation purposes to be decided by a federal jury, even though the law of South Carolina clearly required the judge to resolve this issue. *Id.* at 538. Although *Byrd* was a common law case for personal injuries caused by negligence, this Court held that the injured party had a federally protected right to a jury trial because "the jury on the entire record . . . might reasonably reach an opposite conclusion from the Court of Appeals as to the ultimate fact whether the respondent was a statutory employer." *Id.* at 532.

The certification process formulated by the Court of Appeals and implemented by the Washington Supreme Court in this case obliterates the "judge-jury relationship" recognized by this Court in *Byrd* as being an essential

component of the federal system of justice. First, contrary to the fundamental requirements for summary judgment to be granted under Rule 56 of the Federal Rules of Civil Procedure, the Washington Supreme Court impermissibly shifted the burden of affirmatively proving the existence of a contract to Keystone. It concluded that "[t]he exchange of letters with which we are presented does not constitute a contract to negotiate." Supreme Court Opinion, App. C at 17a. The Court of Appeals, by simply adopting the state court's "explanation" of Washington law, similarly concluded that "Keystone's evidence does not suffice to establish a contract to negotiate." Court of Appeals Opinion, App. B at 7a. Both opinions completely ignore the federal standards universally applicable to the consideration of summary judgment motions. Keystone, as the nonmoving party in a summary judgment proceeding, is not required to prove all the elements of its case in order to defeat the motion.[1]

Second, the Washington Supreme Court decided the ultimate and dispositive issue in this case based exclusively on a mere "summary of facts" provided by the Court of Appeals. Court of Appeals Opinion, App. E at 25a.[2] Although

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[1] Citing Rule 56(e), Xerox argues that: "In response to Xerox's motion for summary judgment dismissing the negotiation claim (and on Keystone's own motion), Keystone had the burden of coming forward with facts sufficient to constitute a contract to negotiate under Washington law." Respondent's Brief in Opposition at 15. However, under Rule 56(e) Keystone, as the adverse party, is only required to "set forth specific facts showing that there is a genuine issue for trial."

[2] The parties were never requested by the Court of Appeals to stipulate as to the facts of the case or otherwise comment on the appropriateness of the certification order. Typically, a comprehensive record, or relevant portions thereof, is presented for

Keystone generally agrees with the background facts as summarized by the Court of Appeals, Keystone emphatically emphasizes that they do not constitute all of the facts necessary for a jury to consider in deciding whether Keystone can prove whether a contract to negotiate was formed in this case.

Third, the Washington Supreme Court's answer to the certified question indicated for the first time that, in order for a contract to negotiate to be enforceable in Washington, the parties must "exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time . . . [There must be] an agreement as to how the parties were required to proceed." Supreme Court Opinion, App. C at 17a-18a. Without the benefit of the Washington Supreme Court's guidance as to the essential elements for an agreement to negotiate, Keystone was unable to identify the facts in this case which are relevant to the determination of whether agreement to negotiate was formed.[3]

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the state court's consideration for the purpose of providing a contextual background for answering the submitted question of local law. For example, in *Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975), a case cited by Xerox, the Fifth Circuit forwarded the entire record to the Supreme Court of Alabama, including "copies of the briefs of the parties, the letter directive, counsels' memoranda on certification, proposed certification with differences and all of the papers." *Id.* at 709.

[3] As this Court specifically recognized in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985):

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the

If Keystone had the opportunity to present its case to a judge or jury based on the requirements of a contract to negotiate established by the Washington Supreme Court, it would contend that the following facts proved that the parties had reached agreement as to a course to follow to guide their negotiation of a contract: (i) the comprehensiveness of the terms of sale expressed in the letters forming the contract resulted in the need for relatively little further negotiation or direction; (ii) the parties had expressly agreed, as the first step in the negotiation process, to "proceed immediately to draft . . . for review and execution" a formal Purchase and Sale Agreement; and (iii) although inexplicably not even mentioned by the Supreme Court, Keystone and Xerox had specifically agreed that the Purchase and Sale Agreement was contemplated to be executed "with[in] thirty (30) days from the execution of this letter of intent." Although these considerations do not necessarily compel a determination that a contract to negotiate had been formed, a rational trier of fact could easily arrive at such a conclusion.

> outcome of the suit under the governing law will properly preclude the entry of summary judgment . . . This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.

II. XEROX HAS FAILED TO PROVIDE ANY SUPPORT FOR CERTIFICATION TO BE USED TO ALLOW A STATE COURT TO RESOLVE FACTUAL DISPUTES AND APPLY THE LAW TO THE FACTS IN DISPOSITION OF THE CASE.

The exclusive purpose of certification is to provide definitive assistance to the federal judiciary in ascertaining the content of state law applicable in cases governed by the "Erie doctrine." Although Xerox contends that it was both "usual and appropriate" for the Court of Appeals to delegate its jurisdictional responsibility for case disposition to a state court by allowing it to decide this case on its merits, the only support Xerox can provide for this assertion is a few isolated cases decided in the Fifth Circuit over thirty years ago. These cases, which represent the extent of the results of Xerox's presumably extensive research, did not even consider the fundamental question of the scope or limitations of the certification process. They clearly did not sanction the state court to assume the federal court's responsibility to resolve disputed factual questions or to apply its determination of new law to the particular facts of the case.

However, one case cited by Xerox, *Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975), merits further consideration. As correctly noted by Xerox, the Fifth Circuit in *Barnes* certified "five fact-specific" questions to the Alabama Supreme Court relating to the interpretation of an insurance policy under Alabama statutory and common law. These questions were to be evaluated in light of the "entire record" in the case, including a factual statement stipulated by the parties. Although the Alabama court answered certain of the questions, due to conflicting evidence on the record as to whether "the insurer's delay in issuing the policy in this case

was within the bounds of reasonableness," it refused to resolve any factual disputes relating to the proper interpretation of the insurance contract. *Barnes v. Atlantic & Pacific Life Ins. Co.*, 325 So.2d 143, 150-51 (1975).

Based on the state court's response to the certified questions, the Fifth Circuit agreed that the insured's estoppel argument "is a fact question which was not within the province of the Alabama Court. It is not for our determination either since this is the role of the Trial Court." *Barnes v. Atlantic & Pacific Life Ins. Co.*, 530 F.2d 98, 100 (5th Cir. 1976). Accordingly, the Fifth Circuit held "as a matter of federal law . . . even on the agreed statement of facts there is a 'genuine issue of material fact' so that summary judgment for the Insurer on this issue was improper." *Id.* at 101. In remanding the case to the district court for trial the Fifth Circuit also observed that the Supreme Court of Alabama "did not, of course, undertake to determine questions of Federal Rules, F.R. Civ. P. 56(c), or federal principles on summary judgment." *Id.*

Similar to whether the insurer in *Barnes* acted reasonably in delaying its issuance of the insurance policy, the determination of whether Xerox and Keystone had agreed "to conform to a specific course of conduct during negotiations" requires an intensively fact-based inquiry which must be completed by the jury at trial. As the Fifth Circuit ultimately determined in *Barnes*, certification cannot be used as a vehicle to alter the fundamental relationship existing between a federal judge and jury. The existence of factual disputes, and the need to present the facts relevant to the question of whether a contract to negotiate was actually formed in this case, precludes a state court from independently making its own determination as to how a case finally should be decided. Xerox has failed to provide any case which supports such a

dramatic departure from established federal practices relating to the certification process.

III. ON MULTIPLE OCCASIONS KEYSTONE RAISED ITS OBJECTIONS TO THE CERTIFICATION ORDER TO BOTH THE WASHINGTON STATE SUPREME COURT AND COURT OF APPEALS.

Contrary to the usual procedures applicable to the certification of questions of local law, neither Keystone nor Xerox participated in the Court of Appeals' formulation of the questions included in the certification order. Consequently, no opportunity existed for either Keystone or Xerox to register their concerns or objections at the inception of the certification process. Further, because the certification order was interlocutory in nature, Keystone had no realistic basis for petitioning this Court to issue a writ of certiorari to review the initial validity of the order.

. . .

Prior to the issuance of the Washington Supreme Court's opinion in answer to the certified question, Keystone filed a motion with the Court of Appeals requesting it to clarify its certification order. In this motion Keystone specifically registered with the Court of Appeals its objections and concerns relating to the Washington Supreme Court being requested to dispose of this case by deciding the ultimate question of whether a contract to negotiate actually existed "under the circumstances presented in this case." In response, the Court of Appeals issued its clarification order which, while acknowledging the "expressions of concern by members of the [supreme] court to deciding the ultimate issue in this specific case," reinforced that it indeed wanted "the certified question [to be] dispositive of the case." Clarification Order, App. D at 21a-22a.

In addition, again prior to the Washington Supreme Court's issuance of its answering opinion, Keystone petitioned the Washington Supreme Court for permission to file additional briefs specifically for the purpose of presenting Keystone's jurisdictional concerns. The Washington Supreme Court, concluding that "supplemental briefing is unnecessary," denied Keystone's motion. Supreme Court Opinion, App. C at 10a, fn. 1. After the Court of Appeals issued its opinion, Keystone also filed a Motion for Panel Rehearing with the Ninth Circuit. This Motion was denied by the Court of Appeals. App. A at 1a.

Because Keystone earnestly on multiple occasions presented its objections to the certification order to both the Washington Supreme Court and Court of Appeals, the basis of Xerox's contention that Keystone failed to timely raise its concerns about the appropriateness of the certification order is misguided and erroneous. Based on the unusual procedural history of this case, Keystone is convinced that it diligently and consistently expressed its objections to the certification order to both the Court of Appeals and Supreme Court.

IV. CONCLUSION.

Accordingly, Keystone requests that its petition for a writ of certiorari be granted. Further, Keystone requests this Court to order the summary reversal of the Court of Appeals' decision.

Respectfully submitted,

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